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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1962

No. [redacted] 75

MADELINE C. SCHROEDER, APPELLANT,

vs.

CITY OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MARCH 2, 1962

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 763

MADELINE C. SCHROEDER, APPELLANT,

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to the Court of Appeals of the State of New York		
Statement under Rule 234	1	1
Notice of appeal to the Appellate Division	3	2
Judgment appealed from	5	3
Order appealed from	6	4
Notice of motion	8	5
Notice of cross-motion	10	6
Complaint	11	7
Answer	18	12
Exhibit B—Notice for the appointment of Commissioners of Appraisal, dated January 10, 1952	30	21
Exhibit C—Affidavit of posting, of Alfred C. May, sworn to March 11, 1952	33	23
Exhibit D—Petition of Board of Water Supply of the City of New York for Neversink Riparian Section No. 4	38	26
Exhibit E—Order appointing Commission in Neversink Riparian Section No. 4, Orange County	50	35

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 22, 1962

	Original	Print
Record on appeal to the Court of Appeals of the State of New York—Continued		
Reply	56	37
Opinion, Taylor, J.	58	38
Notice of appeal to Court of Appeals from judgment	66	40
Order of affirmance, Appellate Division, Supreme Court	68	41
Judgment of affirmance	70	42
Decision of Appellate Division	72	43
Opinion, Reynolds, J.	74	44
Clerk's certificate (omitted in printing)	76a	46
Opinion of the Court of Appeals, Fuld, J.	77	46
Dissenting opinion, Dye, J.	79	48
Judge's and reporter's certificates (omitted in printing)	82a	53
Remittitur of the Court of Appeals	83	53
Judgment of affirmance	86	54
Order of the Supreme Court of the State of New York, County of Sullivan on remittitur	88	56
Notice of appeal to the Supreme Court of the United States	90	57
Order noting probable jurisdiction	93	59

[fol. 1]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

MADELINE C. SCHROEDER, Plaintiff-Appellant,

against

THE CITY OF NEW YORK, Defendant-Respondent.

STATEMENT UNDER RULE 234

This is an appeal from an order made at Special Term, granting the defendant's motion for judgment on the pleadings, denying the plaintiff's cross-motion to dismiss the answer, directing the entry of judgment accordingly, and an appeal from such judgment thereon entered.

This is an action for an injunction, to enjoin the defendant, City of New York, from diverting the waters of the Neversink River. The action was commenced in the Supreme Court, Sullivan County, by the service of a summons and verified complaint on the defendant on or about January 12, 1960.

The verified answer was duly served on the plaintiff on or about March 2, 1960. An order was made at Special Term, March 11, 1960, without opposition, compelling a reply to the answer, said order being entered in the Sullivan County Clerk's office on March 16, 1960. A verified reply was duly served on or about March 21, 1960.

[fol. 2] The defendant moved at Special Term, Albany County, April 22, 1960, for judgment on the pleadings, and the defendant cross-moved for the same relief.

By decision of Special Term, Taylor, J., the motion was granted, and the cross-motion denied.

The order thereon, dated May 25, 1960, was entered in the office of the Clerk of Sullivan County, on May 27, 1960. The notice of appeal from said order, dated May 28, 1960, was filed in the Sullivan County Clerk's office on May 31, 1960, and duly served.

The judgment entered on said order was dated June 8, 1860, (sic) and entered in the Sullivan County Clerk's office on said day. The notice of appeal from said judgment is dated June 13, 1960, and was filed in the Sullivan County Clerk's office on June 14, 1960, and duly served.

The name of the original plaintiff is Madeline C. Schroeder and the name of the original defendant is The City of New York.

That there has been no change or substitution of attorneys or parties since the commencement of this action.

[fol. 3]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

MADELINE C. SCHROEDER, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

NOTICE OF APPEAL TO THE APPELLATE DIVISION—
June 13, 1960

Please Take Notice that the plaintiff, Madeline C. Schroeder, hereby appeals to the Appellate Division of the Supreme Court, Third Department, from the judgment in this action dismissing the complaint herein, dated and also entered in the office of the Clerk of Sullivan County on the 8th day of June, 1960, and from each and every part of said judgment.

Dated: June 13, 1960.

Krieger & Scheinman, Attorneys for Plaintiff, Office & P. O. Address, Woodbourne, New York.

To:

Sullivan County Clerk, Monticello, New York.

Charles H. Tenney, Esq., Corporation Counsel of the City of New York, Attorney for Defendant, 41 John Street, Kingston, New York.

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

JUDGMENT APPEALED FROM — June 8, 1960

A motion having been made by the defendant for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and Civil Practice Act 476, dismissing the complaint herein, and a cross motion having been made by the plaintiff for judgment on the pleadings and for an order under Rule 109(6) of the Rules of Civil Practice striking out three defenses contained in the answer on the ground that they are insufficient in law and said motion and cross-motion having regularly come on to be heard before this Court on the 22nd day of April, 1960, and the said motion on behalf of the defendant for judgment on the pleadings having been granted and the said cross-motion on behalf of the plaintiff for judgment on the pleadings and for an order under Rule 109(6) of the Rules of Civil Practice striking out three defenses contained in the answer having been denied, and an order dismissing said complaint having been made and entered in the office of the Clerk of Sullivan County on May 27, 1960,

Now, on motion of Charles H. Tenney, Corporation Counsel of the City of New York, attorney for the defendant, it is

Adjudged, that the complaint herein be dismissed.

Dated, June 8th, 1960.

Millicent C. Flynn, Clerk.

[fol. 6]

At a Special Term, Part I, of the Supreme Court of the State of New York held in and for the County of Albany, at the Albany County Courthouse in the City of Albany, New York, on the 22nd day of April, 1960.

Present: Hon. Donald S. Taylor, Justice.

[Same title]

ORDER APPEALED FROM—May 25, 1960

A motion having been made by the defendant for judgment on the pleadings under Rule 112 of the Rules of Civil Practice and Civil Practice Act §476, dismissing the complaint herein, and a cross-motion having been made by the plaintiff for judgment on the pleadings and for an order under Rule 109(6) of the Rules of Civil Practice striking out three defenses contained in the answer on the ground that they are insufficient in law and said motion and cross-motion having regularly come on to be heard before this Court on the 22nd day of April, 1960;

Now, on reading and filing the notice of motion dated April 8, 1960, with proof of due service thereof, the notice of cross-motion, dated April 12, 1960, with proof of due service thereof, and upon reading the complaint and answer herein together with the exhibits annexed to said answer and submitted therewith, the order herein, dated March 11, 1960, directing the plaintiff to serve a reply and the reply herein, and the said motions having been sub-
[fol. 7] mitted by Charles H. Tenney, Corporation Counsel (Theodore R. Lee and William A. Kaercher of Counsel), for the defendant, and by Krieger & Scheinman, Esqs. (Louis B. Scheinman of Counsel) for the plaintiff, and due deliberation having been had thereon, and upon filing the opinion of the Court,

Now, on motion of Charles H. Tenney, Corporation Counsel of the City of New York, attorney for the defendant, it is

Ordered, that the motion on behalf of the defendant for judgment on the pleadings be and the same hereby is granted; and it is further

Ordered, that the complaint in this action be and the same hereby is dismissed; and it is further

Ordered, that the Clerk of the Court is hereby directed to enter judgment accordingly; and it is further

Ordered, that the cross-motion on behalf of the plaintiff be and the same hereby is denied.

Dated: May 25th, 1960.

Enter

Donald S. Taylor, J. S. C.

[fol. 8]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

NOTICE OF MOTION—April 8, 1960

Sirs:

Please Take Notice that on the complaint, answer together with the exhibits thereto annexed and incorporated therein by reference, order directing the plaintiff to serve a reply to the new matter contained in the defendant's answer and the reply in the above entitled action, the undersigned will move this Court, at a Special Term, Part I thereof, to be held in and for the County of Albany at the Albany County Courthouse in the City of Albany, New York, on the 22nd day of April, 1960, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can he (sic) heard, for an order pursuant to Civil Practice Act #476 and Rule 112 of the Rules of Civil Practice, giving judgment to the defendant on the pleadings and dismissing the complaint on the ground that the complaint fails to state facts sufficient to constitute a cause of action and on the further ground that the alleged cause of action [fol. 9] stated therein is barred by the Statute of Limita-

tions, and for such other, further and different relief as may be just and proper.

Dated: April 8, 1960.

Yours etc.,

Charles H. Tenney, Corporation Counsel of the City of New York, Attorney for Defendant.

To:

Krieger & Scheinman, Esqs., Attorneys for Plaintiff.

[fol. 10]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

NOTICE OF CROSS-MOTION—April 12, 1960

Sir:

Please Take Notice that upon the Notice of Motion herein dated April 8, 1960, and upon the pleadings herein, the undersigned will cross-move this Court at the return date, April 22, 1960, at 10 o'clock in the forenoon of said day, upon the hearing of the motion herein at the County Court House in the City of Albany, New York, for an order pursuant to Section 476 of the Civil Practice Act, Rule 109, Subdivision 6, with respect to the first, second and third separate defenses, on the grounds that the same consist of new matter and are insufficient in law, and pursuant to Section 476 of the Civil Practice Act and Rule 112 of the Rules of Civil Practice, to dismiss the answer herein upon the grounds that the same is insufficient in law, and for such other and further relief as may be just and proper.

Dated: Woodbourne, New York, April 12, 1960.

Krieger & Scheinman, Attorneys for Plaintiff.

To:

Charles H. Tenney, Esq., Corporation Counsel of the City of New York.

[fol. 11]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

COMPLAINT

Plaintiff, by her attorneys Krieger & Scheinman, complains of the defendant and respectfully alleges:

1. That the plaintiff, at all times hereinafter mentioned, was the owner, and still is the owner, of certain premises located in the Town of Deerpark, Orange County, New York, more particularly described in a deed from Gustav Seise, Jr. to Plaintiff dated March, 1950 and recorded in the Orange County Clerk's office on the 19th day of April, 1950, in liber 1154 of deeds, at page 506.

2. That the defendant is a municipal corporation of the State of New York.

3. That the lands described in the above-mentioned deed consist of 3.5 acres of land, more or less, including land under and along the Neversink River, the southerly boundary of the said premises being along the center line of the said Neversink River the length of 175 feet, more or less.

4. That on the premises abovementioned was and is located a dwelling, with the usual appurtenances.

5. That from the date of the acquisition of said property above described, plaintiff has been and still is owner in fee simple thereof.

[fol. 12] 6. That heretofore and prior to March 14, 1952, the defendant City of New York instituted a proceeding to acquire the right to divert the waters of the Neversink River at the site of the Neversink Dam located at Neversink, Sullivan County, New York, which site is approximately twenty-five miles upstream from the above described premises of the plaintiff.

7. That pursuant to such proceeding an order was made by Special Term of the Supreme Court of the State of New York granting such right to the defendant.

8. That the said proceeding brought by the City of New York was had under Title K41 of the Administrative Code of the City of New York.

9. That in the said proceeding, maps were filed by the defendant in the Orange County Clerk's Office designated the river frontage of the plaintiff thereon as Parcel 424, Neversink Riparian Section #4.

10. That the order of Special Term aforesaid dated March 14, 1952 appointed Commissioners of Appraisal, which commissioners filed their oaths of office on June 9, 1952, the said date, under the aforesaid statute, being the date of the purported taking of the right to divert the river as aforesaid.

11. That the aforesaid premises of the plaintiff were, at all times herein mentioned, occupied by the plaintiff and her family during the summer months of July and August; that during the remainder of the year the plaintiff resides at 30 Seneca Ave., Dumont, New Jersey.

[fol. 13] 12. That under the taking statute aforementioned, the defendant was required to give notice of such taking by publication only, said notice in the following manner: In the City Record of the City of New York, in two public newspapers published in the City of New York, in two public newspapers published in each county in which any real estate to be acquired is located, such publications to be published once in each week in each of said newspapers for six weeks immediately previous to the making of the aforesaid application; and further for the posting of hand bills in at least twenty conspicuous places in the vicinity of the real estate to be taken or affected.

13. That none of the notices so published by the City of New York made any mention of the plaintiff herein or of her property except that the notice stated only that application was being made to acquire the right to divert the waters of the Neversink River as aforesaid.

14. That the section of the river designated as Neversink Riparian Section #4, is approximately 4 miles in length

and a total of only 22 hand bills were posted along the entire lengths of said Section, said hand bills being posted on January 22, 1952.

15. That plaintiff did not during the times herein mentioned ever read or see any copy of this New York City Record, nor did she at any time customarily purchase any newspapers published in the City of New York or any published in Orange County, except on rare occasion, and plaintiff did not at any time observe any of the aforesaid hand bills posted anywheres.

[fol. 14] 16. That at no time prior to her retention of counsel in this case in September, 1959, did plaintiff learn or know that the City of New York had acquired any portion of her property and that she had a right to a claim against the City of New York for damages.

17. That the City of New York did commence to divert the waters of the Neversink River at the site of the Neversink Dam in Sullivan County, New York, on or about June 1, 1953.

18. That the diversion of the Neversink River by the City of New York has greatly and severely damaged the plaintiff and that if the said diversion continues, plaintiff will suffer further damages, and if the said diversion is in perpetuity the same has greatly decreased the market value of her aforesaid property by reason of the fact that the said diversion has destroyed the availability, suitability, and usefulness of the river to plaintiff for bathing, swimming, fishing and boating.

19. That the aforesaid proceeding taken by the City of New York under the statute of aforesaid was and is for the purpose of acquiring a water supply for the inhabitants of the City of New York, inuring to the plaintiff no benefit whatever.

20. That the plaintiff has never been, at any time, notified in any manner that the City of New York sought to acquire the right to divert the Neversink River; nor has she ever been served with any summons, nor been given any other personal notice of any kind whatsoever that the defendant sought to acquire her property.

[fol. 15] 21. That the notice given by the City of New York was by publication only, and plaintiff had no knowledge, either constructive, actual or implied, of such proceeding prior to her retention of counsel herein.

22. That the City of New York is presently diverting the waters of the Neversink River in utter and complete disregard of the rights of the plaintiff.

23. That the provisions of Title K41 of the Administrative Code of the City of New York providing for notice to property owners whose property is to be acquired under the said statute requires notice by publication only, and in such manner as would not reasonably be expected to give notice to all or nearly all persons whose property is being taken.

24. That in the said proceeding the defendant laid out five sections of the Neversink River from the site of the Neversink Dam to the confluence of the said river with the Delaware River into which the Neversink flows, numbering said sections 1 through 5 inclusive.

That the amount of numbered parcels on the city's maps, and the number of mapped parcels designated which failed to file claims prior to the expiration of the Statute of Limitation are as follows:

[fol. 16]

Section No.	*No. of Mapped Parcels*	*No. of Mapped Parcels Not Filing in Time*
1	85	13
2	83	23
3	76	43
4	96	78
5	82	67
	431	224

25. That the numbered parcels on the city's maps consisted only of the river frontage of the lots or tracts of land which extended down to the bank or into the bed of the river. That the numbered parcels shown on the map indicate only the river frontage of each such tract of land

or lot and do not describe the remainder of such tract or lot of land.

26. That in addition to such numbered parcels as described above there is a substantial number of parcels upland from the river which have as easements appurtenant, by deed grant or reservation, rights of way to cross riparian and numbered parcels and to use and enjoy the facilities of the Neversink River.

27. That such upland parcels, despite such rights of way and title to the river, were not separately mapped or numbered and consequently do not appear and are not included in the computation set forth in paragraph "24" above.

28. That in addition to the 224 claims which were not filed in time as set forth in paragraph "24" above, there is a [fol. 17] substantial number of aforedescribed right of way claims which likewise have not been filed in time and which claims are being resisted by the defendant with the defense of Statute of Limitations.

29. That consequently the actual operation of the notice provisions of the condemnation statute has shown the complete inadequacy of such notice provisions contained in said statute.

30. That consequently the notice provisions of the said condemnation statute fail to meet the federal and the state constitutional requirements concerning the taking of private property by due process of law.

31. That consequently the defendant has failed to acquire the right to divert the waters of the Neversink River.

32. That the plaintiff is entitled to an order of this court enjoining and restraining the defendant City of New York from continuing its aforesaid trespass upon plaintiff's property and diverting the waters of the Neversink River.

33. That unless the defendant City of New York is so restrained and enjoined, plaintiff will suffer irreparable damages by reason thereof, having no other adequate remedy at law.

Wherefore, plaintiff demands judgment against the defendant enjoining the defendant from diverting the waters of the Neversink River, and for judgment against the defendant for the costs and disbursements of this action.

Krieger & Scheinman, Attorneys for Plaintiff.

(Verified by Louis B. Scheinman, January 5, 1960.)

[fol. 18]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

ANSWER

The defendant The City of New York, answering the complaint herein:

I. Admits the allegations contained in paragraph "1" of the complaint, except that the defendant denies any knowledge or information sufficient to form a belief as to whether the plaintiff was at all times mentioned in the complaint the owner of the premises referred to therein and is still the owner of said premises.

II. Admits the allegations contained in paragraph "5" of the complaint, except that the defendant denies knowledge or information sufficient to form a belief as to whether the plaintiff has been the owner of said property since the date of acquisition thereof and is still the owner thereof.

III. Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "11", "15" and "16" of the complaint.

IV. Denies the allegations contained in paragraph "12" of the complaint, except the defendant admits that Title K41 of the Administrative Code of the City of New York provides that notice of application for appointment of Commissioners of Appraisal shall be published in the City Record and in two public newspapers published in the City of New York and in two public newspapers pub-
[fol. 19] lished in each county in which any real estate laid out on the taking maps may be located; that such

notice shall be published once in each week in each of such newspapers for six weeks immediately prior to the presentation of the petition; and in addition that hand bills be posted for the same space of time in at least twenty conspicuous places in the vicinity of the real estate to be taken or affected.

V. Denies the allegations contained in paragraph "13" of the complaint, except the defendant admits that the notice for the appointment of Commissioners of Appraisal did not mention the plaintiff's name and that said notice stated that an application would be made to acquire the right to divert water from the Neversink River.

VI. Denies on information and belief the allegations contained in paragraph "18" of the complaint.

VII. Denies the allegations contained in paragraph "19" of the complaint, except the defendant admits that the primary purpose of said proceeding was for the purpose of acquiring a water supply for the City of New York.

VIII. Denies the allegations contained in paragraph "20" of the complaint, except the defendant admits that it did not serve the plaintiff personally with a summons or a notice that the defendant sought to acquire an interest in the plaintiff's property.

IX. Denies the allegations contained in paragraphs "21", "22", "23", "25", "29", "30", "31", "32" and "33" of the complaint.

[fol. 20] X. Denies the allegations contained in paragraph "27" of the complaint, except the defendant admits that said upland properties were not included in the computation set forth in paragraph "24" of the complaint.

As a First Separate and Complete Defense to the Complaint the Defendant Alleges on Information and Belief:

XI. On July 27, 1927, the Board of Water Supply reported to the Board of Estimate and Apportionment recommending a plan for the development of an additional supply of water from tributaries of the Delaware River, including the Neversink River.

XII. A general map of the sources of such additional supply, dated June 21, 1927 accompanied said report.

XIII. A notice dated November 18, 1927, of a hearing before the Board of Estimate and Apportionment on December 15, 1927, regarding the map, plan and profile dated June 21, 1927, was published as prescribed by statute.

XIV. Notice of such hearing was also mailed to the Chairman and Clerks of the Boards of Supervisors of the counties where the real estate to be acquired was situated. Such notice, dated November 18, 1927, was served by mail on the Chairman and Clerk of the Board of Supervisors of Orange County on or about November 23, 1927.

XV. After such public hearing, by resolution dated January 12, 1928, the Board of Estimate and Apportion- [fol. 21] ment approved and adopted said map dated June 21, 1927 as the "final map" of the Delaware project.

XVI. Thereafter said final map was executed in quadruplicate, certified and filed as required by law. One of such maps was filed in the Orange County Clerk's office on or about January 19, 1928.

XVII. A notice dated January 24, 1928, of a hearing before the Water Power and Control Commission regarding said map, plan and profile dated June 21, 1927 was published as prescribed by statute.

XVIII. After the public hearing held pursuant to said notice, by decision dated May 25, 1929, the Water Power and Control Commission approved said map, plan and profile dated June 21, 1927.

XIX. A notice dated October 14, 1938, of a hearing before the Board of Estimate on November 3, 1938, concerning a plan to modify the map and profile dated June 21, 1927 in accordance with a map and profile dated July 21, 1938, was published as prescribed by statute.

XX. Notice of such hearing on November 3, 1938 was also mailed to the Chairmen and Clerks of the Boards of Supervisors of the Counties where the real estate to be acquired was situated. Such notice, dated October 14, 1938, was served by mail on the Chairman and Clerk of the

Board of Supervisors of Orange County on or about October 28, 1938.

[fol. 22] XXI. After such public hearing, by resolution dated November 3, 1938, the Board of Estimate approved and adopted a certain map entitled:

> "City of New York—Board of Water Supply—Modification of Map and Profile of June 21, 1927 Showing Sources of, and Manner of Obtaining an Additional Supply of Water for the City of New York. July 21, 1938."

XXII. Said map dated July 21, 1938 was executed, certified and filed as required by law.

XXIII. One of said maps dated July 21, 1938 was filed in the office of the Clerk of Orange County on or about November 15, 1938.

XXIV. A notice dated January 3, 1939, of a hearing before the Water Power and Control Commission regarding said modification map dated July 21, 1938, was published as prescribed by statute.

XXV. After public hearing held pursuant to said notice, on or about February 20, 1939, the Water Power and Control Commission approved said modification map dated July 21, 1938.

XXVI. Thereafter the Board of Water Supply prepared six similar maps entitled:

> "Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, Map of Real Estate Situated along the Neversink River from the Vicinity of Cuddebackville to the Vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York."

[fol. 23] XXVII. The said six similar maps, known as taking maps, were approved and adopted by the Board of Estimate and filed as required by law. A duplicate original thereof was filed in the Orange County Clerk's office on December 5, 1951.

XXVIII. A reduced scale copy of the taking map for Neversink Riparian Section No. 4 is submitted herewith, marked "Exhibit A", and made a part hereof.

XXIX. The index sheet of the taking map for Neversink Riparian Section No. 4 lists the plaintiff Madeline Schroeder as the claimant or owner of parcel No. 424.

XXX. Sheet No. 10 of the taking map for Neversink Riparian Section No. 4 shows the location of parcel No. 424.

XXXI. The property designated as Parcel No. 424 in the Neversink Section No. 4 proceeding is the same property referred to in paragraph "1" of the complaint.

XXXII. The Corporation Counsel of the City of New York, by notice dated January 10, 1952, gave notice in the City Record, and in two public newspapers published in the City of New York, and in two public newspapers published in Orange County, of his intention to make application to the Supreme Court for the appointment of Commissioners of Appraisal.

XXXIII. A copy of the notice for the appointment of Commissioners of Appraisal, dated January 10, 1952, is attached hereto, marked "Exhibit B" and made a part hereof.

[fol. 24] XXXIV. Such notice of the application for the appointment of Commissioners of Appraisal was published, once in each week, in each of such newspapers, for at least six weeks immediately previous to the return date specified in the notice at which time the petition was presented to the Supreme Court.

XXXV. The notice of application for the appointment of Commissioners of Appraisal for Neversink Riparian Section No. 4 was also posted for the same space of time in at least twenty conspicuous places in the vicinity of the real estate to be taken or affected.

XXXVI. Proof of the publication and the posting of the notice of application for the appointment of Commissioners of Appraisal was filed in the Orange County Clerk's office on May 29, 1952.

XXXVII. A copy of the affidavit of posting, of Alfred J. May, sworn to March 11, 1952, is attached hereto, marked "Exhibit C" and made a part hereof.

XXXVIII. The notice of application for the appointment of Commissioners of Appraisal for Neversink Riparian Section No. 4, was as prescribed by statute.

XXXIX. The publication of said notice for the appointment of Commissioners of Appraisal for Neversink Riparian Section No. 4, was as prescribed by statute.

XL. The posting of said notice for the appointment of Commissioners was as prescribed by statute.

[fol. 25] XLI. The petition in Neversink Riparian Section No. 4 which was presented to the Court upon the application for the appointment of Commissioners of Appraisal was signed and verified by Irving V. A. Huie, then President of the Board of Water Supply on February 15, 1952. The petition set forth the action theretofore taken by the Board of Water Supply and the Board of Estimate, the filing of the taking maps and prayed for the appointment of Commissioners of Appraisal. It contained a general description of the real estate in which an interest, right or easement was sought to be acquired and referred to the parcel numbers as given on the taking maps and it recited that the petitioner sought the right and easement in perpetuity to divert certain waters from and release certain waters into the Neversink River.

XLII. A copy of the petition for Neversink Riparian Section No. 4 is attached hereto, marked "Exhibit D" and made a part hereof.

XLIII. The petition for Neversink Riparian Section No. 4 was as prescribed by statute.

XLIV. The order appointing Commissioners of Appraisal for Neversink Riparian Section No. 4 dated March 14, 1952, was entered in the Orange County Clerk's office on May 29, 1952.

XLV. A copy of the order appointing Commissioners of Appraisal for Neversink Riparian Section No. 4 is attached hereto, marked "Exhibit E" and made a part hereof.

XLVI. The Commissioners of Appraisal subscribed to their oaths of office on June 2, 1952 and their oaths were filed in the Orange County Clerk's office on June 6, 1952, [fol. 26] and in the New York County Clerk's office on June 9, 1952. By order dated June 1, 1953, the term of the Commissioners of Appraisal was extended for a period of eight months from June 9, 1953, to February 8, 1954.

XLVII. Upon the completion of the filing of the oaths of office of the Commissioners of Appraisal on June 9, 1952, the City of New York by virtue of §K41-11.0 of the Administrative Code of the City of New York, became vested with the diversion rights mentioned in the petition and order in all of the property described in the petition and shown on said map, including Parcel No. 424.

XLVIII. Actual diversion commenced on or about June 1, 1953.

XLIX. By an order dated May 19, 1954, entered in the Orange County Clerk's office on May 24, 1954, a successor commission was appointed for Neversink Riparian Section No. 4. The successor Commissioners took their oaths on June 9, 1954. Their oaths were filed in the Orange County Clerk's office on June 10, 1954 and in the New York County Clerk's office on June 14, 1954. By an order dated May 24, 1955, the term of the successor commission was extended for a period of eight months from June 14, 1955 to February 13, 1956.

L. By an order dated March 28, 1956, and entered in the Orange County Clerk's office on April 3, 1956, Neversink Riparian Sections 3, 4 and 5 were consolidated and successor Commissioners of Appraisal were appointed. By an order dated June 4, 1956 and entered in the Orange [fol. 27] County Clerk's office on June 6, 1956 a Commissioner of Appraisal was appointed to act in place and instead of one of the Commissioners of Appraisal appointed by said order dated March 28, 1956. The oaths of the Commissioners of Appraisal designated by said orders dated March 28, 1956 and June 4, 1956, were taken on June 14, 1956, filed in the Orange County Clerk's office on June 15, 1956 and certified copies thereof filed in the Sullivan

County Clerk's office and in the New York County Clerk's office on June 15, 1956 and June 18, 1956 respectively. By an order dated October 7, 1957 the term of said successor Commissioners was extended for a period of eight months from June 19, 1957 to February 18, 1958. By an order dated February 14, 1958 and entered in the Orange County Clerk's office on September 5, 1958, the term of said successor Commissioners was further extended for a period of six months from August 8, 1958. Thereafter a motion was made on behalf of certain claimants to further extend the term of said successor Commissioners but as yet no decision has been rendered on such motion.

LI. More than seven (7) years have elapsed since the filing of the oaths of the Commissioners of Appraisal for Neversink Riparian Section No. 4.

LII. More than six (6) years have elapsed since the actual diversion of water from the Neversink River by the defendant City of New York.

LIII. No claim on behalf of plaintiff Madeline C. Schroeder for the taking of the right to divert nor for the diver- [fol. 28] sion of water from the Neversink River has as yet been exhibited or presented to Commissioners of Appraisal.

LIV. No claim on behalf of the plaintiff Madeline C. Schroeder for the taking of the right to divert nor for the diversion of water from the Neversink River has as yet been presented to the defendant City of New York or any of its officers or employees except the summons and complaint in this action was served on the Law Department of the City of New York on or about January 12, 1960.

LV. Section K41-18.0(a) of the Administrative Code of the City of New York provides, in effect, that claims for damages due to the acquisition of a fee or an easement must be presented within three years after the vesting of title. Section K41-11.0 provides that title vests upon the filing of the oaths of office of the Commissioners of Appraisal.

LVI. This action and any claim of plaintiff Madeline C. Schroeder with respect to the matters alleged in the com-

plaint are barred by the Statute of Limitations contained in Section K41-18.0 of the Administrative Code of the City of New York.

As a Second Separate and Complete Defense to the Complaint the Defendant:

LVII. Repeats, reiterates and realleges paragraphs XI to LVI of this answer.

LVIII. Alleges on information and belief that this action is barred because of the failure of the plaintiff to allege in the complaint that at least thirty days have elapsed [fol. 29] since the demand, claim or claims, upon which the action was founded were presented to the Comptroller of the City of New York for adjustment, that a notice of intention to commence such action was filed with the Comptroller of the City of New York within six months after such action accrued or that the action was commenced within one year after the action accrued as provided in Section 394-a-1.0 of the Administrative Code of the City of New York and Section 50-e of the General Municipal Law.

As a Third Separate and Complete Defense to the Complaint the Defendant:

LIX. Repeats, reiterates and realleges paragraphs XI to LVIII inclusive of this answer.

LX. Alleges on information and belief that this action is barred by the laches of the plaintiff in failing to present a timely claim to Commissioners of Appraisal, in failing to serve a timely claim upon the defendant City of New York, in failing to present a claim or demand to the Comptroller of the City of New York before the commencement of this action and in delaying the commencement of this action.

Wherefore, the defendant demands judgment that the complaint be dismissed with the costs and disbursements of this action.

Charles H. Tenney, Corporation Counsel of the City of New York.

(Verified by Theodore R. Lee, March 1, 1960.)

[fol. 30]

EXHIBIT B, TO ANSWER

Notice of Motion

NEW YORK SUPREME COURT

NINTH JUDICIAL DISTRICT

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. McGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Orange for the purpose of providing an additional supply of pure and wholesome water for the use of City of New York.

NEVERSINK RIPARIAN SECTION NO. 4

PLEASE TAKE NOTICE that it is the intention of the Corporation Counsel of the City of New York, pursuant to the provisions of Title K of the Administrative Code of the City of New York, to make application to the Supreme Court of the State of New York at a Special Term thereof to be held at the Dutchess County Court House, in the City of Poughkeepsie, County of Dutchess, New York, in the Ninth Judicial District, on the 14th day of March, 1952, at the opening of Court on that day, or as soon thereafter as counsel can be heard thereon, for the appointment of [fol. 31] three Commissioners of Appraisal to ascertain and determine the compensation to be made to the owners and all persons interested in certain real estate affected for the purposes indicated in said Title K of the Administrative Code of the City of New York as shown upon a certain map entitled:

"Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of Real Estate Situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York",

adopted by the Board of Estimate November 15, 1951, and filed in the office of the County Clerk of Orange County on December 5, 1951; as Parcels Nos. 219 through 306 and 423 through 430, both inclusive.

The petitioner by this proceeding seeks to become vested with the right and easement in perpetuity in and against all of the parcels of real estate above described and shown on the aforesaid map to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam described in the petition herein, either continuously or from time to time, and in such quantities as the operating needs of the City of New York as determined by it, may require together with the right from time to time to release and discharge into the [fol. 32] Neversink River below the Neversink Dam waters impounded in the Neversink Reservoir.

Dated: January 10, 1952.

DENIS M. HURLEY
Corporation Counsel
Office and Post Office Address
Municipal Building
Chambers and Center Streets
Borough of Manhattan
New York, New York

[fol. 33]

EXHIBIT C, TO ANSWER

Affidavit of Alfred J. May

NEW YORK SUPREME COURT

NINTH JUDICIAL DISTRICT

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. McGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Orange for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

NEVERSINK RIPARIAN SECTION NO. 4
ORANGE COUNTY

State of New York,
County of Ulster, ss.:

ALFRED J. MAY, being duly sworn, deposes and says:

That he is Managing Clerk of the Kingston Office of the Law Department of the City of New York, and is over the age of twenty-one.

That on the 22nd day of January, 1952, he posted copies of the Notice of Application for the Appointment of Commissioners of Appraisal herein in hand bills in twenty-two [fol. 34] conspicuous places in the vicinity of the real estate to be taken or affected by this proceeding as follows, viz:

Town of Deerpark, Orange County

1. Easterly side of Neversink River, 2400' easterly from Route 209 on tree (on parcel 253) on westerly side of road to Bloomingburg near bridge over Basher Kill.

2. Easterly side of Neversink River, on a tree at southerly side of intersection Route 209 and road to Bloomingburg, near highway bridge.

3. Easterly side of Neversink River, 100′ westerly from Route 209, on tree on easterly side of lane along Neversink River, near highway bridge.

4. Easterly side of Neversink River, 1200′ westerly from Route 209, on tree on westerly side of lane along Neversink River, near highway bridge.

5. Westerly side of Neversink River, on a tree at westerly corner of intersection of Old Route 209 and road along westerly side of Neversink River near highway bridge.

6. Westerly side of Neversink River, on a pole at the corner of southerly side of Route 209 and road to railroad station.

7. Easterly side of Neversink River, on tree at westerly side of road 100′ downstream from first highway bridge below confluence of Neversink River and Basher Kill.

[fol. 35] 8. Westerly side of Neversink River, on tree at southerly side of road 100′ west of first highway bridge below confluence of Neversink River and Basher Kill.

9. Westerly side of Neversink River, on pole at northeast corner of intersection of road to Myers Grove and the road from Godeffroy.

10. On westerly side of Neversink River, on tree at northeasterly side of intersection in Myers Grove.

11. On westerly side of Neversink River, on tree at easterly side of Route 209, southerly 500′± from intersection with road to Myers Grove in Godeffroy.

12. On westerly side of Neversink River on tree at easterly side of Route 209, about one mile southerly from Godeffroy.

13. On westerly side of Neversink River, on tree at easterly side of Route 209, about 1¾ mile southerly from Godeffroy.

14. On westerly side of Neversink River, on pole on side road on easterly side of Route 209, opposite main intersection in Huguenot.

15. On westerly side of Neversink River, on tree on southeasterly corner of intersection of Route 209 (about 0.6 mile southerly from Huguenot) and road to highway bridge across Neversink River in parcel 275.

16. On easterly side of Neversink River, on tree at easterly side of road just below highway bridge in vicinity of riparian parcel 275.

[fol. 36] 17. On easterly side of Neversink River, on tree at easterly side of road near house on riparian parcel 299.

18. On westerly side of Neversink River, on tree at easterly side of Route 209 in the vicinity of entrance to parcel 306.

19. On westerly side of Neversink River, on tree at easterly side of Route 209, in the vicinity of parcel 300.

20. On westerly side of Neversink River, on tree at easterly side of Route 209 in front of State Police Barracks.

21. On westerly side of Neversink River, on tree at easterly side of Route 209 in the vicinity of parcel 281.

22. On westerly side of Neversink River, on tree at easterly side of Route 209 at entrance road to parcel 274 (Van Inwegen).

That the aforesaid hand bills were posted by your deponent in at least twenty-two conspicuous places in the vicinity of the real estate to be taken or affected on January 22, 1952, and which posting was six weeks immediately previous to the presentation of such petition.

Deponent further says that said hand bills were entitled as follows, and that a specimen thereof is hereto attached:

"Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of real estate situated along the Neversink River from the vicinity of

[fol. 37] Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York."

ALFRED J. MAY

Sworn to before me this
11 day of March, 1952.
WILLA MAE EDWARDS, Notary Public

(Note: This notice was printed on durable cloth approximately 28 inches by 18 inches.)

[fol. 38]

EXHIBIT D, TO ANSWER

Petition

NEW YORK SUPREME COURT
NINTH JUDICIAL DISTRICT

IN THE MATTER
of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. McGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the County of Orange for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

NEVERSINK RIPARIAN SECTION No. 4
ORANGE COUNTY

TO THE SUPREME COURT OF THE STATE OF NEW YORK:
NINTH JUDICIAL DISTRICT

The petition of the Board of Water Supply of the City of New York respectfully shows to the Court, and alleges upon information and belief, for and on behalf of said City:

I.

That Irving V. A. Huie, Rufus E. McGahen and Edward C. Maguire are duly appointed commissioners constituting [fol. 39] the Board of Water Supply of the City of New York, and that said Irving V. A. Huie is President of said Board, and duly authorized by said Board to sign and verify this petition which is made pursuant to the provisions of Title K of Chapter 41 of the Administrative Code of the City of New York (Laws 1937, Chapter 929, as amended).

II.

That the Board of Water Supply on the 27th day of July, 1927, reported to the Board of Estimate and Apportionment of the City of New York, recommending a plan for the development of an additional supply of pure and wholesome water from tributaries of the Delaware River and for the construction of an aqueduct tunnel for the delivery of said additional water to Hill View Reservoir.

Accompanying said report was a map and profile dated June 21, 1927, entitled:

> "Board of Water Supply of the City of New York, Map and Profile Showing Sources of, and manner of Obtaining, an Additional Supply of Water for the City of New York",

which is a general map or plan of the sources of additional supply and of the aqueduct tunnel to be constructed for the delivery of said additional supply of water to the Hill View Reservoir and includes thereon the real estate hereinafter described.

[fol. 40] III.

That the Board of Estimate and Apportionment, after a public hearing thereon, held after due and reasonable public notice thereof affording all persons interested a reasonable opportunity to be heard, thereafter, and on the 12th day of January, 1928, by resolution, duly approved and adopted the aforesaid final map or plan and directed that the same

be executed, certified in quadruplicate and filed as required by law, and that a petition be made to the State Water Power and Control Commission for the approval of said final map or plan. That said final map or plan is known and commonly referred to as the "Delaware Project" and it included, among other things, a plan to divert the waters of the Delaware River and certain tributaries thereof.

IV.

That thereafter said final map or plan was executed and certified in quadruplicate and said map or plan and certified copies thereof filed as required by law.

V.

That thereafter, the State Water Power and Control Commission, on the 25th day of May, 1929, by order and decision duly made, signed and filed, upon an application duly made by the City therefor, duly approved said map or plan.

[fol. 41]

VI.

That thereafter the Supreme Court of the United States, on or about the 25th day of May, 1931, in an action brought by the State of New Jersey against the State of New York and the City of New York, to which the State of Pennsylvania became a party by intervention, duly made and entered a decree authorizing the City of New York to divert from the Delaware River or its tributaries to the New York City Water Supply the equivalent of 440 million gallons of water daily, subject to the conditions in said decree set forth, and enjoining any diversion by the City in excess of that amount.

VII.

That the Board of Water Supply, on the 8th day of September, 1938, presented to the Board of Estimate of the City of New York, a report recommending a modification of the aforesaid final map or plan hereinbefore described, accompanied by a map and profile dated July 21, 1938, entitled:

"City of New York, Board of Water Supply Modification of Map and Profile of June 21, 1927, Showing Sources of and Manner of Obtaining, an Additional Supply of Water for the City of New York".

That the Board of Estimate, on the 3rd day of November, 1938, after a public hearing thereon held pursuant to due and reasonable public notice thereof according to law, by resolution, duly approved and adopted the aforesaid mod- [fol. 42] ification and directed that the said modified map or plan be executed, certified and filed as required by law and that application for approval of said modification be made to the State Water Power and Control Commission. That thereafter the aforesaid modified map or plan was duly executed, certified and filed as required by law and upon application duly made therefor, the State Water Power and Control Commission, on February 20, 1939, by an order and decision duly made, signed and filed, duly approved the same. That the map or plan thus approved complies in all respects with the requirements of the aforesaid decree of the Supreme Court of the United States of May 25, 1931, in said action brought by the State of New Jersey against the State of New York and the City of New York, and said decision of the State Water Power and Control Commission requires that, execution of said plan and operations after such execution be in conformity with the provisions of said decree.

VIII.

That the aforesaid decision of the State Water Power and Control Commission approved the construction by the City of New York of a dam commonly referred to as Neversink Dam and a reservoir on the Neversink River commonly referred to as Neversink Reservoir. That the Neversink Dam, construction of which was approved as aforesaid, will be approximately 2800 feet in length; its top will be at an elevation of 1460 feet and its spillway at an elevation of 1440 feet above mean sea level at Sandy Hook, and con- [fol. 43] struction of said dam and its appurtenances will impound approximately thirty-seven billion gallons of water which is the estimated storage capacity of said Neversink Reservoir.

IX.

That the aforesaid Neversink Reservoir will be approximately 5 miles in length, with a maximum width of about 1.5 miles and an average width of about 1/2 and a shore line of approximately 18 miles, and a maximum depth of water in said reservoir when full of 180 feet; the average depth will be about 70 feet.

X.

That the Board of Water Supply is proceeding to construct the structures required and has proceeded to acquire the various lands and rights necessary for the Neversink Reservoir.

XI.

That the Board of Water Supply, in accordance with the provisions of Title K of the Administrative Code of the City of New York, after having caused a survey to be made, prepared six similar maps of real estate situated in the Town of Deerpark, County of Orange, State of New York, to be affected by the acts of the City of New York in the execution of the aforesaid final map or plan as adopted, modified and filed as aforesaid. Each of said maps is entitled:

[fol. 44] "Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of Real Estate Situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York."

The Board of Water Supply and its Chief Engineer on the 30th day of October, 1951; duly approved and signed the aforesaid six similar maps and the Board of Estimate on November 15, 1951, duly adopted the same.

XII.

That the Corporation Counsel on the 5th day of December, 1951, filed one of the said six similar maps in the office of the Clerk of the County of Orange.

XIII.

That in accordance with the provisions of Title K of the Administrative Code of the City of New York, upon said map so filed as aforesaid, there was plainly indicated, laid out and numbered, the parcels of real estate to be affected by the acts of the City of New York in the execution of the aforesaid final map or plan as modified.

[fol. 45]

XIV.

That the Petitioner by this proceeding seeks to become vested with the right and easement in perpetuity in and against all the parcels of real estate herein described and shown on the aforesaid map filed herein, to divert all, or any part, of the waters of the Neversink River and its tributary watershed originating above the aforesaid Neversink Dam, either continuously or from time to time, and in such quantities as the operating needs of the City of New York as determined by it, may require; together with the right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters impounded in the Neversink Reservoir.

XV.

In the exercise of the rights and easements to be acquired herein, Petitioner will at all times observe and adhere to each and every one of the provisions of the decree of the Supreme Court of the United States referred to in Paragraph VI herein, and to any subsequent modification thereof.

XVI.

That the rights in the real estate and to the waters of the Neversink River which are to be acquired in perpetuity by this proceeding are necessary for constructing, maintaining, and operating Neversink Reservoir and appur-
[fol. 46] tenances and for the execution of the aforesaid final map or plan as modified to furnish the inhabitants of the City of New York an additional supply of pure and wholesome water.

XVII.

A general description of the real estate to be affected for the purposes of this proceeding is as follows:

All those certain lots, pieces or parcels of real estate situated in the Town of Deerpark, in the County of Orange, State of New York, shown upon a certain map entitled:

"Board of Water Supply of the City of New York, map of real estate situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot in the Town of Deerpark, County of Orange, State of New York",

adopted by the Board of Estimate on the 15th day of November, 1951, and filed in the office of the Clerk of the County of Orange on the 5th day of December, 1951, as Parcel Nos. 219 through 306 and 423 through 430, both inclusive.

XVIII.

Petitioner further alleges that it has taken all the steps and discharged all the duties imposed upon it by law to entitle it to make this application and further states that no previous or other application has been made for the relief herein sought.

[fol. 47] WHEREFORE, the Petitioner, the Board of Water Supply of the City of New York, for and on behalf of the City of New York, and for the purpose of vesting in the City of New York the right and easement in perpetuity in and against all the parcels of real estate herein described and shown on the aforesaid map filed herein, to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the aforesaid Neversink Dam, either continuously or from time to time and in such quantities as the operating needs of the City of New York, as determined by it, may require; together with the right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters im-

pounded in the Neversink Reservoir, prays this Honorable Court to make an Order in accordance with the provisions of Title K of the Administrative Code of the City of New York, appointing three disinterested and competent freeholders, at least one of whom shall reside in the City of New York, and at least one of whom shall reside in Orange County, as Commissioners of Appraisal with full power to ascertain and determine the compensation to be made by the Petitioner under the Federal and State Constitutions and the laws of the State of New York to the owners and all persons interested in the real estate described herein and shown on the map filed in the Orange County Clerk's Office as aforesaid, by reason of the acquisition of the aforesaid right in perpetuity and by reason of the execution of the aforesaid final map or plan as modified and [fol. 48] to ascertain and determine any and all legal damages payable by the Petitioner under the provisions of Title K of the Administrative Code of the City of New York.

And your Petitioner further prays that the Court shall in said Order fix the time and place of the first meeting of said commissioners and grant such other and further relief as may be just and proper.

Dated: New York, February 15th, 1952.

THE BOARD OF WATER SUPPLY

By: IRVING V. A. HUIE
Commissioner and President

Approved as to form:

DENIS M. HURLEY
Corporation Counsel

State of New York,
County of New York, ss.:

IRVING V. A. HUIE, being duly sworn, deposes and says: That he is a member and the President of the Board of Water Supply of the City of New York, the Petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true to the knowledge of deponent, except as to those

matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the sources of deponent's information and the grounds of his belief as to such matters are the records of the City of New York and its departments and officials in the pos- [fol. 49] session of said Board of Water Supply; and that this verification is made by deponent in pursuance of a resolution as required by law, of the said Board of Water Supply authorizing the verification of this petition to be made by deponent.

IRVING V. A. HUIE

Sworn to before me this
15th day of February, 1952.
RICHARD H. BURKE

(Notary Stamp affixed to original)

[fol. 50]

EXHIBIT E, TO ANSWER

Order Appointing Commission in Neversink Riparian Section No. 4, Orange County

At a Special Term of the Supreme Court of the State of New York, held in and for the Ninth Judicial District at the Dutchess County Courthouse, in the City of Poughkeepsie, New York, on the 14th day of March, 1952.

Present:

Hon. J. Gordon Flannery, Justice.

IN THE MATTER

of

The Application and Petition of IRVING V. A. HUIE, RUFUS E. MCGAHEN and EDWARD C. MAGUIRE, constituting the Board of Water Supply of the City of New York, to acquire real estate for and on behalf of the City of New York under Title K of the Administrative Code of the City of New York (L. 1937, Ch. 929), in the Counties of Sullivan and Orange, for the purpose of providing an additional supply of pure and wholesome water for the use of the City of New York.

On reading and filing the petition of the Board of Water Supply of the City of New York, verified by Irving V. A. Huie, Commissioner and President, on the 15th day of February, 1952, from which it appears that the acquisition [fol. 51] in perpetuity of the right and easement, in and against all the parcels of real estate described in said petition and shown on the map therein referred to, one of which was filed in the office of the Clerk of Sullivan County on the 5th day of December, 1951, which right and easement in perpetuity is to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam, either continuously or from

time to time in such quantities as the operating needs of the City of New York, as determined by it, may require, together with the right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters impounded in the Neversink Reservoir; and it further appearing that due and proper notice of this application has been given by the posting of handbills and publication as required by law; and on reading and filing such proofs of such posting and publication, and upon all the papers and proceedings duly taken and had herein from which it appears that all provisions of law have been complied with;

Now, after hearing Denis M. Hurley, Corporation Counsel of the City of New York, Robert E. Hugh, Esq., of Counsel, in support of said application and petition, and no one appearing in opposition thereto; and due deliberation having been had, it is

ORDERED, that William E. Doulin of 318 Montgomery St., Newburgh, Orange County, Nathan Sweedler, 194 Crown St., Brooklyn, N. Y. of New York City, and John L. Palisi, 5 Cliff Street, Beacon, Dutchess County, all three of whom [fol. 52] are disinterested and competent freeholders, be, and they hereby are appointed Commissioners of Appraisal to ascertain and determine the compensation to be made to the owners of and all persons interested in the real estate laid down on said map and described in said petition in and against the parcels in which the City of New York proposes to acquire the right and easement in perpetuity to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam, either continuously or from time to time and in such quantities as the operating needs of the City of New York, as determined by it, may require, and the further right from time to time to release and discharge into the Neversink River below the Neversink Dam, waters impounded in the Neversink Reservoir; and to ascertain and determine the compensation to be made by the petitioners under the Federal and State Constitutions and the Laws of the State of New York, to the owners and all persons interested in the real estate described and

shown on the aforesaid map by reason of the acquisition of the aforesaid rights and easements in perpetuity and by reason of the execution of the aforesaid final map or plan as modified; and to exercise and discharge all the powers and duties conferred upon such Commissioners of Appraisal by Title K of the Administrative Code of the City of New York; and it is further

ORDERED, that the first meeting of said Commissioners of Appraisal shall be held in the City of Newburgh, New [fol. 53] York, on the 2nd day of June, 1952, in the Supreme Court Room, in the County Court House at 1:30 o'clock in the afternoon of that day, and it is further

ORDERED that the City of New York be and it is hereby directed to release and discharge waters into the Neversink River below the Neversink Dam in the amount of three million gallons daily, from November 1st to and including April 7th, and ten million gallons daily from April 8th to and including October 31st in each year.

Enter in Orange County.

J. GORDON FLANNERY
J. S. C.

[fol. 56]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

REPLY

Plaintiff, for her reply to the answer herein, pursuant to the order of this Court made herein, respectfully:

As to the First Affirmative Defense:

1. Denies the allegation of Paragraph "XXXI" of the Answer herein except that the plaintiff admits that said parcel No. 424 is a portion of the property referred to in Paragraph "1" of the complaint.

2. Denies the allegation of Paragraph "XXXV" of the Answer herein except that the plaintiff does admit that notice of application was posted for the same space of

time in at least 20 places in Neversink Riparian Section No. 4.

3. Denies the allegation of Paragraph "XL" except that the plaintiff does admit that said notices were posted in at least 20 places in Neversink Riparian Section No. 4.

4. Denies the allegations of paragraphs "XLVII" and "LVI" of the answer.

As to the Second Affirmative Defense:

5. Denies the allegations contained in Paragraph "LVIII" of the answer.

[fol. 57] As to the Third Affirmative Defense:

6. Denies the allegations of Paragraph "LX" of the answer.

Wherefore, plaintiff demands judgment dismissing the Answer herein with the costs and disbursements of this action.

Krieger & Scheinman, Attorneys for Plaintiff.

(Verified by Louis B. Scheinman, March 14, 1960.)

[fol. 58]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

OPINION—April 22, 1960

(Supreme Court, Albany County Special Term,

April 22, 1960)

(Justice Donald S. Taylor, Presiding)

Appearances:

Krieger & Scheinman, Esqs., Attorneys for plaintiff, Louis B. Scheinman, Esq., of Counsel.

Charles H. Tenney, Esq., Corporation Counsel, Attorney for defendant, Theodore R. Lee and William A. Kaercher, Esqs., of Counsel.

Memorandum

TAYLOR, J.:

This is an action instituted by a riparian owner whose premises extend about 175 feet to and along the center of the Neversink River permanently to enjoin the defendant from diverting its waters upstream from plaintiff's property for the purposes specified in Title K 41 of the Administrative Code of the City of N York.

The defendant moves for judgment on the pleadings. (Civ. Prac. Act, §476; Rules Civ. Prac., Rule 112.) The plaintiff cross-moves for similar relief and also to strike three defenses consisting of new matter on the ground that they are insufficient in law. (Rule 109, subd. 6, *supra*.) [fol. 59] The parties are agreed that the sole issue to be determined on the respective motions for judgment is whether the notice provisions of Section K 41-8.0 of the Water Supply Act—admittedly fully complied with by the defendant—upon which the diversional rights which the defendant exercises are to some extent founded are violative of the due process provisions of the Federal and State Constitutions (N. Y. Const., Art. I, §6; U. S. Const., Amendts. 5 and 14 §1.)

Mr. Justice MacAffer thoroughly considered, and, in my judgment, correctly determined the constitutional questions which are presented here. (*Matter of Huie* [*Bruckman*]; Sup. Ct., Sullivan Co., Feb. 17, 1956, see, also, *Matter of Huie* [*Richle*], Sup. Ct., Orange Co., June 17, 1959, Eager, J.; *Matter of Huie* [*Nielson*], 6 A. D. 2d 837.)

Accordingly, the motion is granted and the cross-motion is denied.

Submit order.

[fol. 66]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS FROM JUDGMENT—
August 16, 1961

SIR:

Please Take Notice that the plaintiff above named hereby applies to the Court of Appeals of the State of New York from the judgment in the above entitled action, entered in the office of the Clerk of the County of Sullivan on the 11th day of August, 1961, which was entered upon an order of the Appellate Division of the Supreme Court, Third Department, entered in the office of the Clerk of said Appellate Division on the 8th day of August, 1961, which said order unanimously affirmed the judgment of the Supreme Court in the above entitled action, entered in the office of the said Clerk of Sullivan County on or about the 8th day of June, 1960.

Please Take Further Notice that the plaintiff appeals from each and every part of said judgment of the said Ap-
[fol. 67] pellate Division of the Supreme Court and from the whole thereof.

Dated: August 16, 1961.

Yours, etc.

Krieger & Scheinman, Attorneys for Plaintiff-Appellant, Office & Post Office Address, Woodbourne, New York.

To: The Clerk of the County of Sullivan.

Leo A. Larkin, Corporation Counsel of the City of New York, attorney for the City of New York, 41 John Street, Kingston, New York.

[fol. 68]

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, in the County of Albany, at the County Court House in the City of Albany, on the 13th day of March, 1961.

Present:

Hon. Francis Bergan, Presiding Justice.
Hon. James Gibson, Hon. J. Clarence Herlihy, Hon. Walter B. Reynolds, Associate Justices.

Madeline C. Schroeder, Plaintiff-Appellant,

against

The City of New York, Defendant-Respondent.

(No. 2678)

Order of Affirmance—entered August 8, 1961

The above named plaintiff-appellant in this action, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department from an order of the Supreme Court made at Special Term, Albany County, entered in the office of the Clerk of Sullivan County [fol. 69] on May 27, 1960 granting respondent's motion for judgment on the pleadings, dismissing the complaint and denying appellant's cross-motion to dismiss the answer and from the judgment dismissing the complaint entered thereon in the office of the Clerk of Sullivan County on June 8, 1960 and the said appeal having been argued by Louis B. Scheinman, of counsel for appellant and by Theodore R. Lee of counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision of the court herein heretofore filed:

It Is Unanimously Ordered and Adjudged, that the order and judgment so appealed from be and the same hereby are affirmed, without costs. The opinion is referred to herewith.

Alfred J. Grodecki, Asst. Deputy Clerk.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 70]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

MADELINE C. SCHROEDER, Plaintiff,

against

THE CITY OF NEW YORK, Defendant.

JUDGMENT OF AFFIRMANCE—August 11, 1961

The above named plaintiff, Madeline C. Schroeder, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court made at Special Term, Albany County, entered in the office of the Clerk of Sullivan County on May 27, 1960, granting the defendant's motion for judgment on the pleadings, dismissing the complaint and denying the plaintiff's cross-motion to dismiss the answer and from the judgment dismissing the complaint entered thereon in the office of the Clerk of Sullivan County on June 8, 1960, and the said Appellate Division of the Supreme Court having rendered its decision unanimously affirming said judgment and order, without costs, and having ordered and adjudged that the judgment and order so appealed from be affirmed, without costs, and a certified copy of the order of said Appellate Division having been duly filed together with the record, in the office of the Clerk of Sullivan County,

[fol. 71] Now on motion of Leo A. Larkin, Corporation Counsel of the City of New York, attorney for the defendant, it is

Ordered, Adjudged and Decreed, that the judgment and order so appealed from be and the same hereby are in all things affirmed.

Judgment signed and entered this 11 day of August, 1961.

Millicent C. Flynn, Clerk.

[fol. 72]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

2678

MADELINE C. SCHROEDER, Appellant,

v.

THE CITY OF NEW YORK, Respondent.

DECISION OF APPELLATE DIVISION—August 1, 1961

Order and judgment affirmed, without costs.

Opinion by Reynolds, J.
Bergan, P. J., and Herlihy, J., concur.
Gibson, J., concurs in the result.

[fol. 73]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

MADELINE C. SCHROEDER, Plaintiff-Appellant,

vs.

THE CITY OF NEW YORK, Defendant-Respondent.

Argued, March Term, 1961.

Before:

Hon. Francis Bergan, Presiding Justice.

Hon. James Gibson, Hon. J. Clarence Herlihy, Hon. Walter B. Reynolds, Associate Justices.

Appeal from order and judgment entered thereon granting respondent's motion for judgment on the pleadings and denying appellant's cross-motion to dismiss the answer.

[fol. 74] Krieger & Scheinman, Attorneys for Plaintiff-Appellant, Woodbourne, N. Y.

Charles H. Tenney, Corporation Counsel, City of New York, Attorney for Defendant-Respondent, 41 John Street, Kingston, N. Y.

OPINION—August 1, 1961

REYNOLDS, J.:

Appellant, riparian owner of a parcel of land on the Neversink River in Orange County, brought suit to enjoin respondent from diverting said river upstream from appellant's property. Respondent in 1952 commenced a proceeding to acquire the right to divert the river. In accordance with the provisions of S K 41-8.0 of the Administrative Code of the City of New York, notice of the proposed diversion, properly listing the property affected was published each week for six weeks prior to the presentation of the petition in the city record, two public newspapers published in the City of New York and two public newspapers published in the county in which the appellant's property was situated. In addition handbills were posted in at least 20 conspicious places in the vicinity of the real estate affected. There is no requirement for written notice and none was sent. The statute bars claims not filed within 3 years from the filing of the oaths of the Commissioners of Appraisal (June 9, 1952) or within 3 years of the diversion (June 2, 1953). Appellant does not dispute that there has been compliance with the provisions of the Administrative Code but asserts that the notice requirements of [fol. 75] S K 41.8.0 are violative of Article 1, 6 of the New York Constitution and Amendments 5 and 14 1 of the United States Constitution claiming that constructive notice is constitutionally inadequate. Constructive notice has long been upheld by the courts of this state in proceedings

similar to the instant case (*Rexford* v. *Knight*, 11 N. Y. 308; *Benedict* v. *State of New York*, 120 N. Y. 228 (1890); *Matter of City of Rochester (In re McLean)*, 102 App. Div. 181 [4th Dept.]).

In the *City of Rochester* case at pp. 186-187:

> "As we have seen, personal notice was not served upon the owners of the premises, and we think such service was not necessary. The Legislature was competent to declare what notice would be sufficient. It has been held that a notice is sufficient if of a kind which it is reasonably probable would apprise the party proceeded against of the proceeding, and such as will give such party an opportunity to be heard. (*Matter of Union El. R. R. Co. of Brooklyn*, 112 N. Y. 61; *Matter of Mayor, etc., of City of New York*, 99 *id.* 570.)
>
> "We think that under those authorities the notice prescribed by the act in question employed with the requirements of the Constitution."

Appellant urges that the Supreme Court opinion in *Walker* v. *Hutchinson*, 352 U. S. 112 decided in 1956 is determinative of the issues here presented. However the pertinent provisions of the Kansas statute in *Walker* are a far cry from those publications requirements in EK 42-8.0. [fol. 76] The Kansas statute also provided for an alternate notice in writing which is absent in the New York statute involved herein. Under EK 41-8.0 appellant had 3 years from the filing of the oaths of the commissioners or from the diversion, whichever was later, in which to file her claim. In our opinion the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a 3-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions. We do not feel compelled to declare unconstitutional a statute which was enacted in 1905 and which has been consistently upheld by the courts. (Cf. *Matter of Huie* [*Neilson*], 6 A. D. 2d 837; *Matter of Huie* [*Rollins*], 204 Misc. 945; *Matter of Huie* [*Buckman*], Supreme Court, Rensselaer County [MacAffer, J.], February 17, 1956.)

The order and judgment should be affirmed.

[fol. 76a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 77]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

MADELINE C. SCHROEDER, Appellant,

v.

CITY OF NEW YORK, Respondent.

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* * * * * * * * *

OPINION—Decided January 25, 1962

FULD, J. On this appeal, before us as of right on constitutional grounds, we are called upon to decided whether the notice provisions of the Water Supply Act (Administrative Code of City of New York, ch. 41, tit. K) contravene requirements of the Due Process Clause of the Federal Constitution (5th and 14th Amdts.; see also N. Y. Const., art. I, § 6).

The City of New York, the defendant herein, early in 1952 instituted a proceeding, pursuant to the Water Supply Act, to acquire the right to divert a portion of the Neversink River in Orange County; in June, the city became vested with such a right, and about a year later, in June of 1953, work on the actual diversion commenced. Seven years thereafter, the plaintiff, a riparian owner of a parcel of land on the Neversink, brought this action to enjoin the city from diverting the river upstream from her property. It was her position, as reflected in her complaint, that it was not until 1959 that she learned that the city "had acquired any portion of her property" and that she had a right to file a claim; that the diversion damaged her property and, if the diversion continued, would occasion further damage; that she had no notice of the city's proceeding; that the notice provisions of the Water Supply Act are constitutionally inadequate; and that, consequently, the

city acquired no right to divert water from the river and should be restrained from so doing.

The city, after serving an answer, moved for judgment on the pleadings (Rules Civ. Prac., rule 112), on the ground (among others) that the plaintiff's action was barred by her failure to file a claim, as required by the Water Supply Act (Administrative Code, § K41-8.0), within three years [fol. 78] from the time title vested in the city or within three years from the time of the actual diversion, whichever happened to be later. The court at Special Term, deciding the motion in favor of the city, dismissed the complaint and the Appellate Division unanimously affirmed the resulting judgment. As already indicated, the plaintiff appeals to this court as of right.

Due process does not, of course, require or insist upon personal service in every type of case. Constitutional demands are satisfied if the notice provided for (and given) is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 314; see, also, *Walker* v. *Hutchinson City*, 352 U. S. 112, 115.) And, in determining whether the statutory notice provided for is just and reasonable, "reference" must necessarily be had "to the subject with which the statute deals." (*American Land Co.* v. *Zeiss*, 219 U. S. 47, 67.)

With controlling principles in mind, we believe that the notice provided for by the Water Supply Act satisfies the demands of due process of law. Not only does that statute (the predecessor of which was enacted in 1905) call for frequent publication in "public newspapers"—once a week for six weeks in two newspapers published in New York City and in two papers published in each county in which the real estate affected is located—but it also provides for the posting of handbills, likewise for a period of six weeks, "in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected" (§ K41-8.0).

These requirements were fully complied with—notice of the proposed diversion of the Neversink River was published in appropriate newspapers and, as noted by the Ap-

pellate Division, "handbills were posted in at least 20 conspicuous places in the vicinity of the real estate affected".[1] Moreover, since we deal with real property (cf. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 316, *supra*), it is of considerable significance that the effect of the challenged diversion was clearly apparent long before the expiration of the three-year period within which the plaintiff was required to file her claim. In sum, as Justice REYNOLDS, speaking for a unanimous Appellate Division, observed, "the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a three-year [fol. 79] period would constitute sufficient notice to meet • • • [constitutional] requirements".[2]

In the light of what we have written, it is hardly necessary to say that the present case, concerned as it is with notice respecting the tangible and the visible, is quite unlike the *Mullane* case (339 U. S. 306, *supra*).

The judgment appealed from should be affirmed, with costs.

DYE, J. (dissenting). The basic issue on this appeal is whether technical compliance with the notice provisions of the New York City Water Supply Act is constitutionally adequate to satisfy the requirements of due process for the taking of property or an interest therein. We think not

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[1] As to the plaint that the handbills were posted in the month of January and might not be readable in July when a Summer resident such as the plaintiff returned to the area, we need but note that these handbills were printed with permanent ink on durable cloth, about 28 inches long and 18 inches wide, and were firmly affixed to the trees and poles to which they were attached and that they undoubtedly remain legible for years. And, with respect to the notice in the newspapers, we would but add that no newspaper is published in the particular community in which the plaintiff's property is situated.

[2] The fact that a considerable number of property owners failed to present damage claims within the time specified by the statute is beside the point. What the situation may have been in these cases, we are not told and we do not know. It may well be that the omission to file indicated, not that the owners were unaware of the diversion, but that they did not believe that their properties were sufficiently affected to justify the presentation of claims.

and feel obliged to express our dissent from the decision about to be rendered.

The appellant is the owner in fee of premises designated on the appropriation map for the Delaware project as parcel No. 424, Neversink riparian section No. 4 in Deerpark, Orange County, which is about 25 miles downstream from the site of the Neversink Dam and Reservoir in Sullivan County. It is alleged that as a result of such public work her property was adversely affected and seriously damaged. Her claim for compensatory damage, like that of many others, filed more than three years after the vesting, has been rejected for untimeliness (Administrative Code, § K41-18.0).

The New York City Water Supply Act (Administrative Code of City of New York, ch. 41, tit. K), prescribes the procedures to be followed by the Board of Water Supply in acquiring real estate, easements and rights affecting real property required for its water supply system. Section K41-8.0 relates to the manner in which notice shall be given for the appointment of commissioners of appraisal for the purpose authorized.

In pertinent part that section provides: "The corporation counsel shall give notice in the City Record, and in two public newspapers published in the city of New York and in two public newspapers published in each other county in which any real estate laid out on such map may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal * * * Such notice shall be so published, once in each week, in each of such newspapers, for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected."

[fol. 80] When the city undertook the construction of the "Delaware Project" for the use of its water supply system it, technically, complied with all prescribed procedures including the publication and posting of notice of the application for the appointment of commissioners of appraisal.

The publication in Orange County was made in newspapers situate in the rural communities of Chester and Warwick located many miles from the subject property and with no circulation in the community where the premises were located although at the time there were available newspapers in the nearby communities of Port Jervis and Middletown. We note too that 22 handbills were posted on trees along highway Route 209 and on trees along the easterly and westerly banks of the Neversink River for a distance of about 100 feet on either side of certain bridge crossings. The posting and publication were done in the month of January and, although in compliance with the letter of the statute, such publication and posting in such remote places at a time when it was known that the subject premises would be vacant, it seems to me, fail to comply with its spirit and intent and as matter of fact failed to give this plaintiff and numerous others, similarly situated, any reasonable opportunity of knowing that such a proceeding was pending.

It is also significant that of the 422 numbered parcels affected or taken and designated on the appropriation map, the fee owners of 224 of such parcels—something more than half—failed to file in time and these figures include only those riparian parcels and exclude those which have appurtenant easements for use of the river, as admitted by defendant's answer. Of that number, the great majority are owners of property located in a section remote from the actual dam project. We cannot believe that all of these owners, if apprised of the intended condemnation, would for their own reasons fail to act to protect their interests.

In our view, the statute relied on is inherently defective since no provision is made for personal service, or any adequate substitute. It is, of course, recognized that personal notice may not always be possible, but that affords no reason why a statute should omit reasonable requirements and depend only on publication and posting of the kind provided by this statute. This statute falls short of the constitutional principles dealt with in *Mullane* v. *Central Hanover Trust Co.* (339 U. S. 306, revg. 299 N. Y. 697, which had affd. 274 App. Div. 772 in which VAN VOORHIS,

J., dissented in an opinion). The principles there enunciated should be followed here. *Mullane* was an accounting proceeding under the common trust fund as established by section 100-c of the New York Banking Law. The notice provisions were challenged as contravening constitutional due process for lack of provision for adequate notice. The notice there provided was a constructive one by publication. [fol. 81] As Justice VAN VOORHIS pointed out in his dissent, which reasoning was adopted with approval by Justice JACKSON writing for a majority in the Supreme Court of the United States, "The fundamental requisite of due process of law is the opportunity to be heard." (*Grannis* v. *Ordean*, 234 U. S. 385, 394.) As Justice JACKSON expressed it: "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest * * * is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U. S. 457; * * * *Priest* v. *Las Vegas*, 232 U. S. 604; *Roller* v. *Holly*, 176 U. S. 398. * * *. The reasonableness, and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected". (339 U. S., pp. 314-315.)

The statute now before us does not satisfy these elemental tests since it makes no provision for the giving of personal notice of a pending application for the appointment of commissioners, but relies solely on a defective constructive form of notice. The essential thing is notice. It is only when such notice cannot be given personally that resort should be had to a substitute or alternative method such as publication and posting, and then it must be done in a manner calculated to afford actual notice. Here personal service is not required, and no personal service was made although such a requirement could have been easily met since the city knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given. If constructive service were to be authorized, it could have

been provided in some form which was not calculated to go unobserved by the persons to be affected.

It cannot be disputed that due process "requires that an owner whose property is taken for public use must be given a hearing in determining just compensation" and "The right to a hearing is meaningless without notice." (*Walker* v. *Hutchinson City*, 352 U.S. 112, 115.)

Furthermore, it is apparent from the opinion written in the court below that their holding of constitutional validity was not free from doubt because they added, as an additional ground for affirmance, that "In our opinion the publications, posting and the *patently visible effect of the diversion proceedings on the Niagara sink over a three-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions.*" (Italics supplied.) However that may be as a comment, it affords no substitute for the fundamentals of due process, that is, a notice reasonably calculated under all the circumstances to apprise a party of the pendency of the action and afford an opportunity to be heard.

[fol. 82] The plaintiff's complaint alleges a cause of action to restrain the diversion on constitutional grounds. The passage of time prevents the granting of that relief but does not prevent a determination of the constitutional question and thus afford this plaintiff an opportunity to have her claim filed and to be heard on the issue of damages for the appropriation. Such a result gives the plaintiff her day in court which so far has been denied—not because she defaulted or acquiesced—but because she never had notice of the pendency of the proceeding sufficiently adequate to satisfy constitutional due process for the taking of her property.

The judgment appealed from should be reversed, with costs in all courts, and plaintiff's cross motion for judgment on the pleadings granted.

Chief Judge DESMOND and Judges FROESSEL and BURKE concur with Judge FULD; Judge DYE dissents in an opinion in which Judge VAN VOORHIS concurs; Judge FOSTER taking no part.

Judgment affirmed.

[fol. 82a] Judge's and reporter's certificate to foregoing paper (omitted in printing).

[fol. 83]

No. 361

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of January, in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

[fol. 84]

Madeline C. Schroeder, Appellant,

vs.

The City of New York, Respondent.

Remittitur—January 25, 1962

Be It Remembered, That on the 27th day of October in the year of our Lord one thousand nine hundred and sixty-one, Madeline C. Schroeder, the appellant in this cause, came here unto the Court of Appeals, by Kreiger & Scheinman, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Louis B. Scheinman of counsel for the appellant—, and by Mr. Theodore R. Lee, of counsel

for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein [fol. 85] be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

[fol. 86]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

SULLIVAN COUNTY

MADELINE C. SCHROEDER, Plaintiff,

—against—

THE CITY OF NEW YORK, Defendant.

JUDGMENT OF AFFIRMANCE—February 9, 1962

MADELINE C. SCHROEDER, the above named plaintiff, having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, Third Department, entered in this action in the office of the Clerk of

the County of Sullivan on the 11th day of August, 1961, affirming the judgment entered thereon on the 8th day of June, 1960, in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed with costs and a remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Sullivan, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court and directing the entry of a judgment of affirmance herein with costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein; and the costs of the defendant having been taxed at $338.63;

Now, on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for defendant, it is

Adjudged that the judgment in this action entered on the 11th day of August, 1961, be, and the same hereby is, [fol. 87] affirmed, and that the defendant, The City of New York, recover of the plaintiff Madeline C. Schroeder, the sum of Three Hundred Thirty-eight and 63/100 ($338.63) Dollars, costs as taxed, and for execution therefor.

Judgment entered this 9th day of February, 1962.

Millicent C. Flynn, Clerk.

[fol. 88]

At a Special Term of the Supreme Court held in and for the County of Sullivan at the Sullivan County Court House in the Village of Monticello, New York, on the 9th day of February, 1962.

Present:

Hon. Lawrence H. Cooke, Justice.

MADELINE C. SCHROEDER, Plaintiff,

—against—

THE CITY OF NEW YORK, Defendant.

ORDER ON REMITTITUR—February 9, 1962

The above mentioned Madeline C. Schroeder, having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, Third Department, entered on the 11th day of August, 1961 in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, with costs;

Now, upon reading and filing the remittitur of the Court of Appeals herein, dated January 25, 1962, it is on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for the defendant,

Ordered, that said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court and that the judgment entered herein in the office of the Clerk of the County of Sullivan on August 11, 1961, be, and [fol. 89] the same hereby is affirmed, and that a Judgment of this Court be entered herein affirming said judgment with the costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein.

Enter in Sullivan County

Lawrence H. Cooke, Justice of the Supreme Court.

[fol. 90]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF SULLIVAN

MADELINE C. SCHROEDER, Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 13, 1962

I. Notice is hereby given that Madeline C. Schroeder, the plaintiff-appellant above named, hereby appeals to the Supreme Court of the United States from the Final Order of Remittitur of the Court of Appeals of the State of New York, dated January 25, 1962, affirming the order and judgment of the Appellate Division of the Supreme Court in the action entitled: "Madeline C. Schroeder, Plaintiff, v. The City of New York, Defendant;" this appeal also being taken from the Judgment of Affirmance dated February 9, 1962, and the Order of the Supreme Court dated February 9, 1962, making the judgment of the Court of Appeals the judgment of the Supreme Court of the State of New York, all of said orders having been entered in the Sullivan County Clerk's Office on February 9, 1962.

This appeal is taken pursuant to 28 U.S.C. §1257, subd. 2.

II. The Sullivan County Clerk will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States. Said transcript shall include all of the papers forming the record on appeal in the Court of Appeals of the State of New York, together with the following papers:

[fol. 91] Order of Remittitur of the Court of Appeals.

Order of the Supreme Court entered February 9, 1962.

Judgment of affirmance entered February 9, 1962.

III. The following question is presented by this appeal:

Is Title K41-8.0 of the Administrative Code of the City of New York, also known as Chapter 724, Sec. 8, of the Laws of 1905 of the State of New York, as last amended by Chapter 357, Sec. 4 of the Laws of 1939 of the State of New York, unconstitutional on its face and as applied in this case in that it provides in a condemnation proceeding for notice which is entirely constructive and also fails to provide even minimum standards for such notice, thereby taking from plaintiff her real property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

Louis B. Scheinman, Attorney for Appellant, Office and Post Office Address, Woodbourne, New York.

To:

Millicent C. Flynn, Sullivan County Clerk, Monticello, New York.

Leo A. Larkin, Esq., Corporation Counsel of the City of New York—Appellee, 41 John Street, Kingston, New York.

John F. Davis, Esq., Clerk of the Supreme Court of the United States, Washington 25, D. C.

[fol. 92] Affidavit of service (omitted in printing).

[fol. 93]

SUPREME COURT OF THE UNITED STATES

No. 763—October Term, 1961

MADELINE C. SCHROEDER, Appellant.

vs.

CITY OF NEW YORK.

ORDER NOTING PROBABLE JURISDICTION—April 30, 1962

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. [redacted] 75

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

JURISDICTIONAL STATEMENT.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

Index.

	Page
(a) Opinions Below	1
(b) Grounds of Jurisdiction	2
(c) Questions Presented	3
(d) Statement of the Case	3
(e) The Federal Question Raised is Substantial	5
Appendix:	
Exhibit A	11
Exhibit B	13
Exhibit C	16
Exhibit D	24
Exhibit E	26
Exhibit F	28
Exhibit G	30

CASES CITED.

	Page
City of New York v. N. Y., N. H. & H. Ry. Co., 344 U. S. 293	2, 7
Grannis v. Ordean, 234 U. S. 385	2
Milliken v. Meyer, 311 U. S. 457	2
Mullane v. Central Hanover Trust Co., 339 U. S. 306	2, 7
Priest v. Board of Trustees of Las Vegas, 232 U. S. 604	2
Roller v. Holly, 176 U. S. 398	2
Walker v. City of Hutchinson, Kansas, 352 U. S. 112	2, 7
Wisconsin Electric Power Co. v. Milwaukee, 352 U. S 948	2, 7
Wuchter v. Pizzuti, 276 U. S. 13	2, 8, 9

OTHER AUTHORITIES CITED:

Administrative Code of City of New York, Title K41-11.0	4
Administrative Code of City of New York, Title K41-18.0 (a)	4
28 U. S. Code, Section 1257 (2)	2

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MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT.

(a) Opinions Below.

The opinion of the court of original jurisdiction, Supreme Court, Special Term, Albany County, dated April 22, 1960, was not reported. A copy of said opinion is hereto annexed as Exhibit "A." The Appellate Division of the Supreme Court, Third Department, wrote an opinion for affirmance dated August 1, 1961. Said opinion was reported at 14 A. D. 2d 183, 217 N. Y. S. 2d 975, under the name of *Madeline C. Schroeder v. The City of New York*. A copy is hereto annexed as Exhibit "B." In the Court of Appeals there was a majority opinion and a minority opinion, the same having been handed down January 25, 1962, but not yet reported. A copy of said opinions of the Court of Appeals is annexed hereto as Exhibit "C."

(b) Grounds of Jurisdiction.

(i) This action was instituted by appellant for an injunction to enjoin the appellee from diverting the waters of the Neversink River. The appellee had been authorized to divert the said river by an order of the New York Supreme Court obtained pursuant to Title K41 of the Administrative Code of the City of New York. Appellant contended in the complaint that the notice provisions contained in Section 8.0 of said statute failed to meet the Federal and State constitutional requirements of due process of law. A copy of the statute in question is annexed hereto as Exhibit "D."

(ii) The final order of the Court of Appeals was made on January 25, 1962, and entered in the office of the Clerk of Sullivan County on February 9, 1962, Exhibit "E." No application was made for rehearing. The judgment of affirmance, Exhibit "F," and the order thereon, Exhibit "G," were dated February 9, 1962, and entered on said day. The notice of appeal was filed February 13, 1962, with the Sullivan County Clerk, with whom all papers in this action have been filed, and duly served.

(iii) The jurisdiction of this Court is invoked under 28 U. S. Code §1257 (2).

(iv) Cases believed to sustain the jurisdiction are: *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112; *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306; *City of New York v. New York, N. H. & H. Ry. Co.*, 344 U. S. 293; *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948; *Grannis v. Ordean*, 234 U. S. 385; *Milliken v. Meyer*, 311 U. S. 457; *Priest v. Board of Trustees of Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398; *Wuchter v. Pizzuti*, 276 U. S. 13.

(v) The statute involved is 8.0 of Title K41 of the Administrative Code of the City of New York, also referred to as Chapter 724, § of the Laws of 1905, as last amended by Chapter 357, § 4, of the Laws of 1939 of the State of New York.

(c) Questions Presented.

1. Is Title K41-8.0 of the Administrative Code of the City of New York unconstitutional on its face and as applied in this case in that it provides in a condemnation proceeding for notice which is entirely constructive and fails to provide even minimum standards for such notice, thereby taking from the appellant in this case her real property without due process of law in violation of the Fourteenth Amendment of the United States Constitution?

(d) Statement of the Case.

(Numerals in parentheses refer to pages of the record in the N. Y. Court of Appeals.)

Appellant is the owner of a parcel of land on and riparian to the Neversink River and brought this action for an injunction to restrain the City of New York from diverting the river.

Appellant is one of a great number of property owners along the Neversink River who failed to file their claims for compensation within the three year limitation of time simply because during the said period she had no notice of any kind of the acquisition by appellee of an interest in her property.

The notice given by appellee, in compliance with the letter of the statute, consisted of: Publication once a

week for six weeks in the city record and two newspapers published in New York City, and two newspapers published in Orange County where this property is located, the newspapers having been obviously deliberately selected to be those published many miles from the property affected, despite the availability of newspapers published in the vicinity of the properties; the posting of 22 notices, 19 on trees and 3 on poles, on both sides of the Neversink River along a 7 or 8 mile stretch thereof (the above total figure for *both* sides of the river); the notice making no mention of any of the names of the persons affected, although each was known to appellee; the notice merely announcing the appellee's intention to apply on the return date for an order acquiring the right to divert and the appointment of Commissioners; the notice containing no indication that action was required of any property owner; and the notice, dated January 10, 1952, having been published in January, calling for a March 14, 1952, return date, despite the fact that the great majority of the properties were summer-occupied only (R. 30-32).

As appellant had no notice or knowledge of this proceeding, she did not appear.

On said date of March 14, 1952, an order was made granting the application and appointing Commissioners of Appraisal who filed their oaths of office on June 9, 1952, said latter date becoming the date of the vesting of title (R. 12, Title K41-11.0).

Under Sec. 18.0 (a) of Title K41, unless property owners file claims for compensation within three years of said taking date, their claims are "forever barred" and they receive no compensation whatever.

During the period of the application, and until about June 1, 1953, nothing occurred in the river itself. On the latter date, the river was diverted. Appellant, prior to her retention of counsel in 1959, had no notice, actual

nor implied, of the taking of her property. She had not been served with any summons, nor had she (or any other property owners) been personally notified even by letter, nor in any other way, of this proceeding.

Instead of filing a claim, which would have been late, she immediately commenced this action for an injunction, based upon the inadequacy of the notice provisions of the statute in question.

The federal question, being the gravamen, or the essence, of the suit, is raised in the initial pleading, the complaint, and has been the sole issue in this case. Paragraph 30 of the complaint states: "That consequently the notice provisions of the said Condemnation Statute failed to meet the Federal and the State constitutional requirements concerning the taking of private property by due process of law" (R. 17).

The complaint also alleged the irreparable damage to appellant's property (R. 17).

After answer, and reply, the appellee moved at Special Term for judgment on the pleadings to dismiss the complaint under Rule 112 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, thereby, for the purposes of the motion, admitting the factual allegations of the complaint. The appellant cross-moved for the dismissal of the answer, under the same Rule and Section, the answer not having raised any factual issue nor having alleged any notice additional to that set forth above.

(e) The Federal Question Raised is Substantial.

This is a "test case," the outcome of which will determine at least two hundred claims pending and awaiting the result hereof.

Pleaded in the complaint, and admitted by the answer, are the following figures showing the number of claims filed too late (R. 15-16).

Section No.	No. of Mapped Parcels	No. of Mapped Parcels Not Filing in Time
1	85	13
2	83	23
3	76	43
4	96	78
5	82	67
	431 (should be 422)	224

Additionally, the complaint alleges, and the answer admits, that there are a substantial number of properties upland from the river with deed rights-of-way thereto, which properties were not mapped by appellee, the City treating same as if they did not even exist, a large number of which failed to file their claims in time (R. 16-17).

This Schroeder property was mapped by appellee and designated on the Section No. 4 Map as parcel #424, in which section over 81% of the properties were acquired by appellee without compensation to the property owners!

In addition to the many cases now pending, this statute in question is still being used by appellee. For example, the Cannonsville Reservoir and Dam, which will impound and divert the west branch of the Delaware River, is presently under construction, the statute in question providing appellee with the opportunity to acquire many more properties without compensation by simply hiding the notices. As Judge Dye said in his dissent; "If constructive notice were to be authorized, it could have been provided in some form which was not *calculated to go unobserved* by the persons to be affected." (Italics added.)

This Court established an eminently just principal of law in the case of *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, holding that where the names and post office addresses of persons affected by a proceeding are at hand, that reasons disappear for resort to means less likely than the mails to apprise them of its pendency. This principal was re-affirmed by this Court in the case of *City of New York v. New York, N. H. & H. Rr. Co.*, 344 U. S. 293, in *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, and in *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948. In the case at bar, the names of the owners of mapped parcels, such as Mrs. Schroeder, were listed on the maps prepared by appellee, the river frontage of each property was shown on the maps to a tenth of a foot, and the mailing of notices would have been indeed a simple matter.

The majority of the New York Court of Appeals relied upon the posting of handbills and the supposed visible effect of the diversion before the expiration of the three-year statute of limitations as taking this case out of the scope of the above cited cases.

The minority of said court held that the publication of notices in distant newspapers with no circulation in the area of the properties despite the availability of newspapers in nearby communities, together with the posting of handbills in remote places at a time when it was known that the properties would be vacant, failed to provide any reasonable notice, and that the statute in question was inherently defective in making no provision for personal service, or any adequate substitute even though personal service could have easily been made.

A question therefore presented on this appeal is whether only notice by publication is defective where the names and addresses of the persons affected are known to the condemning authority, or whether, a statute provid-

ing for publication of notices omitting the names of the persons affected, omitting reference to action that is required to be taken by property owners, and omitting any requirement for the selection of newspapers in the area of the properties affected, coupled with a general requirement for such notices to be posted in the general vicinity of the properties (in this case 22 along 7 or 8 miles of river—14 to 16 miles of river banks), in the forests on trees and poles, in January when the properties are generally vacant, with a return date six weeks thereafter; although the names and addresses of each property owner is known to the condemning authority, complies with due process.

The question is also whether the posting of 22 notices as aforesaid to apprise 96 owners of mapped parcels, and a great many owners of unmapped properties likewise affected (in Section 4 at least another 100) should, as a matter of law and as a practical matter of fair play, take this case out of the scope of the eminently fair rule laid down in *Mullane* and the other cases cited above.

With respect to the reliance by the majority of the New York Court of Appeals upon the supposed visible effects of the diversion, we point out, firstly, that the diversion did not take place until one year and three months *after* the return date of the application. This was not an *ex parte* application, and entitled property owners affected to appear and object and raise any other question with respect to the application. In fact, this was done by certain property owners in Section No. 1, near the dam itself, who obtained from the appellee concessions incorporated into the court order appointing commissioners requiring the appellee to make certain minimum releases.

Secondly, the New York Court, in relying upon the supposed visible effects of the diversion, completely overlooked the case of *Wuchter v. Pizzuti*, 276 U. S. 13 (1928). By

considering the imagined "visible effect" of the diversion as providing some type of actual notice, to overcome the infirmity of the statute, the learned Court below decided, contrary to the said *Wuchter* case, that this supposed notice supplied constitutional validity to the defective statute. Not only did this supposed notice occur more than a year after the return date of the application at which time property owners could have raised objections, but it also occurred only two years prior to the expiration of the statute of limitations for the filing of claims for compensation, there being a three-year statute of limitations.

Thirdly, if this statute is upheld on these grounds, we can see the consequence of the diversion occurrring *after* the expiration of even the three-year period for the filing of claims. This is not far-fetched nor speculative. To buttress the existence of this possibility, we point out that in the case of appellee's diversion of the Rondout, it acquired the right to divert on May 6, 1941, and the date of the actual diversion was April 3, 1944, just one month short of the expiration of the statute of limitations to file claims.

Fourthly, the supposition by the learned Court below of this "visible effect" has no basis in this record. It is not even alleged in the answer. It was merely argued by appellee in its brief, and vigorously denied by appellant in her brief, and is not a part of this record. Considering the fact that this case is before the Court on a motion and cross-motion on the pleadings, with nothing in this record other than the pleadings, the Court below took judicial notice of an alleged fact vehemently denied by appellant, thereby depriving her of her right to a trial as to this question of fact, if it is at all relevant in the first place.

Appellant's property is approximately twenty-five miles downstream from the Neversink Dam (R. 12). The percentage of diversion at her property is approximately 50%. However, the effect of the diversion is not apparent to a

layman as the height of the stream is not necessarily lowered. The temperature of the water, however, and the velocity of flow, is greatly changed with the result of a complete destruction of bathing, swimming and fishing facilities in the river. It is difficult in the space allotted in this statement to give this point the extensive and scientific explanation required, but appellant shall brief the same fully should this Court accept jurisdiction.

In conclusion, we point out that the conduct of the appellee in appropriating real property under the statute in question by providing notice in compliance with the letter of the statute in question, but calculated to go unobserved, forbodes even greater abuses in future condemnations should the statute be upheld, in addition to that illustrated here. It is therefore respectfully submitted that the Federal question is indeed substantial.

Respectfully submitted,

LOUIS B. SCHEINMAN,
Counsel for Appellant.

APPENDIX.

Exhibit A.

STATE OF NEW YORK, SUPREME COURT.

SULLIVAN COUNTY.

MADELINE C. SCHROEDER,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

(Supreme Court, Albany County, Special Term, April, 22, 1960.)

(Justice Donald S. Taylor, Presiding.)

Appearances:

Krieger & Scheinman, Esqs., Attorneys for plaintiff, Louis B. Scheinman, Esq., of Counsel.

Charles H. Tenney, Esq., Corporation Counsel, Attorney for defendant, Theodore R. Lee and William A. Kaercher, Esqs. of Counsel.

Memorandum.

TAYLOR, J.:

This is an action instituted by a riparian owner whose premises extend about 175 feet to and along the center of the Neversink River permanently to enjoin the defendant from diverting its waters upstream from plaintiff's prop-

erty for the purposes specified in Title K 41 of the Administrative Code of the City of New York.

The defendant moves for judgment on the pleadings. (Civ. Prac. Act, §476; Rules of Civ. Prac., Rule 112.) The plaintiff cross-moves for similar relief and also to strike three defenses consisting of new matter on the ground that they are insufficient in law. (Rule 109, subd. 6, *supra.*)

The parties are agreed that the sole issue to be determined on the respective motions for judgment is whether the notice provisions of Section K 41-8.0 of the Water Supply Act—admittedly fully complied with by the defendant—upon which the diversional rights which the defendant exercises are to some extent founded are violative of the due process provisions of the Federal and State Constitutions (N. Y. Const., Art. I, §6; U. S. Const., Amendts. 5 and 14, §1).

Mr. Justice Mac Affer thoroughly considered, and, in my judgment, correctly determined the constitutional questions which are presented here. (*Matter of Huie* [*Bruckman*], Sup. Ct., Sullivan Co., Feb. 17, 1956; see, also, *Matter of Huie* [*Riehle*], Sup. Ct., Orange Co., June 17, 1959, Eager, J.; *Matter of Huie* [*Neilson*], 6 A. D. 2d 837.)

Accordingly, the motion is granted and the cross-motion is denied.

Submit order.

Exhibit B.

2678

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

MADELINE C. SCHROEDER,

Plaintiff-Appellant,

vs.

THE CITY OF NEW YORK,

Defendant-Respondent.

Argued, March Term, 1961.
Decided, August 1, 1961.

Before:

Hon. Francis Bergan,
Presiding Justice,
Hon. James Gibson,
Hon. J. Clarence Herlihy,
Hon. Walter B. Reynolds,
Associate Justices.

Appeal from order and judgment entered thereon granting respondent's motion for judgment on the pleadings and denying appellant's cross-motion to dismiss the answer.

Krieger & Scheinman, Attorneys for Plaintiff-Appellant, Woodbourne, N. Y.

Charles H. Tenney, Corporation Counsel, City of New York, Attorney for Defendant-Respondent, 41 John Street, Kingston, N. Y.

Exhibit B

Opinion for Affirmance.

REYNOLDS, J.:

Appellant, riparian owner of a parcel of land on the Neversink River in Orange County, brought suit to enjoin respondent from diverting said river upstream from appellant's property. Respondent in 1952 commenced a proceeding to acquire the right to divert the river. In accordance with the provisions of §K 41-8.0 of the Administrative Code of the City of New York, notice of the proposed diversion, properly listing the property affected was published each week for six weeks prior to the presentation of the petition in the city record, two public newspapers published in the City of New York and two public newspapers published in the county in which the appellant's property was situated. In addition handbills were posted in at least 20 conspicuous places in the vicinity of the real estate affected. There is no requirement for written notice and none was sent. The statute bars claims not filed within 3 years from the filing of the oaths of the Commissioners of Appraisal (June 9, 1952) or within 3 years of the diversion (June 2, 1953). Appellant does not dispute that there has been compliance with the provisions of the Administrative Code but asserts that the notice requirements of §K41.8.0 are violative of Article 1, §6 of the New York Constitution and Amendments 5 and 14 §1 of the United States Constitution claiming that constructive notice is constitutionally inadequate. Constructive notice has long been upheld by the courts of this State in proceedings similar to the instant case (*Rexford v. Knight*, 11 N. Y. 308; *Benedict v. State of New York*, 120 N. Y. 228 [1890]; *Matter of City of Rochester* [*In Re McLean*], 102 App. Div. 181 [4th Dept.]).

Exhibit B

In the *City of Rochester* case at pp. 186-187:

> "As we have seen, personal notice was not served upon the owners of the premises, and we think such service was not necessary. The Legislature was competent to declare what notice would be sufficient. It has been held that a notice is sufficient if of a kind which it is reasonably probable would apprise the party proceeded against of the proceeding, and such as will give such party an opportunity to be heard (*Matter of Union El. R. R. Co. in Brooklyn*, 112 N. Y. 61; *Matter of Mayor, etc., of City of New York*, 99 *id.* 570).
>
> "We think that under those authorities the notice prescribed by the act in question complied with the requirements of the Constitution."

Appellant urges that the Supreme Court opinion in *Walker v. Hutchinson*, 352 U. S. 112, decided in 1956, is determinative of the issues here presented. However, the pertinent provisions of the Kansas statute in *Walker* are a far cry from those publication requirements in K 41-8,0. The Kansas statute also provided for an alternate notice in writing which is absent in the New York statute involved herein. Under K 41-18,0 appellant had 3 years from the filing of the oaths of the commissioners or from the diversion, whichever was later, in which to file her claim. In our opinion the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a 3 year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions. We do not feel compelled to declare unconstitutional a statute which was enacted in 1905 and which has been consistently upheld by the courts (Cf. *Matter of Huie* [*Neilson*], 6 A. D. 2d 837; *Matter of Huie* [*Rollins*], 204 Misc. 945; *Matter of Huie* [*Bruckman*], Supreme Court, Rensselaer County [MacAffer, J.] February 17, 1956).

The order and judgment should be affirmed.

Exhibit C.

STATE OF NEW YORK,

COURT OF APPEALS.

MADELINE C. SCHROEDER,

Appellant,

vs.

THE CITY OF NEW YORK,

Respondent.

Opinion.

FULD, J.:

On this appeal, before us as of right on constitutional grounds, we are called upon to decide whether the notice provisions of the Water Supply Act (Administrative Code of the City of New York, tit. K, ch. 41) contravene requirements of the Due Process Clause of the Federal Constitution (5th and 14th Amdts.; see, also, N. Y. Const., art. I, §6).

The City of New York, the defendant herein, early in 1952 instituted a proceeding, pursuant to the Water Supply Act, to acquire the right to divert a portion of the Neversink River in Orange County; in June, the City became vested with such a right, and about a year later, in June of 1953, work on the actual diversion commenced. Seven years thereafter, the plaintiff, a riparian owner of a parcel of land on the Neversink, brought this action to enjoin the City from diverting the river upstream from her property. It was her position, as reflected in her complaint, that it was not until 1959 that she learned that the City "had acquired any portion of her property" and that she had a right to file a claim; that the diversion damaged her property and, if the diversion contin-

ued, would occasion further damage; that she had no notice of the City's proceeding; that the notice provisions of the Water Supply Act are constitutionally inadequate; and that, consequently, the City acquired no right to divert water from the river and should be restrained from so doing.

The City, after serving an answer, moved for judgment on the pleadings (Rules Civ. Prac., rule 112), on the ground (among others) that the plaintiff's action was barred by her failure to file a claim, as required by the Water Supply Act (Administrative Code, §K41-18.0), within three years from the time title vested in the City or within three years from the time of the actual diversion, whichever happened to be later. The court at Special Term, deciding the motion in favor of the City, dismissed the complaint and the Appellate Division unanimously affirmed the resulting judgment. As already indicated, the plaintiff appeals to this court as of right.

Due process does not, of course, require or insist upon personal service in every type of case. Constitutional demands are satisfied if the notice provided for (and given) is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314; see, also, *Walker v. Hutchinson City*, 352 U. S. 112, 115). And, in determining whether the statutory notice provided for is just and reasonable, "reference" must necessarily be had "to the subject with which the statute deals" (*American Land Co. v. Zeiss*, 219 U. S. 47, 67).

With controlling principles in mind, we believe that the notice provided for by the Water Supply Act satisfies the demands of due process of law. Not only does that statute, which was enacted in 1905, call for frequent publication in "public newspapers"—once a week for six weeks in two newspapers published in New York City and in two papers published in each county in which the real estate affected is located—but it also provides for the

posting of handbills, likewise for a period of six weeks, "in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate to be * * * taken or affected" (§K41-8.0).

These requirements were fully complied with—notice of the proposed diversion of the Neversink River was published in appropriate newspapers and, as noted by the Appellate Division, "handbills were posted in at least twenty conspicuous places in the vicinity of the real estate affected."[1] Moreover, since we deal with real property (cf. *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 316, *supra*), it is of considerable significance that the effect of the challenged diversion was clearly apparent long before the expiration of the three-year period within which the plaintiff was required to file her claim. In sum, as Judge Reynolds, speaking for a unanimous Appellate Division, observed, "the publications, postings and the patently visible effect of the diversion proceedings on the Neversink over a 3-year period would constitute sufficient notice to meet * * * [constitutional] requirements."[2]

In the light of what we have written, it is hardly necessary to say that the present case, concerned as it is with notice respecting the tangible and the visible, is quite unlike the *Mullane* case (339 U. S. 306, *supra*).

The judgment appealed from should be affirmed, with costs.

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[1] As to the plaint that the handbills were posted in the month of January and might not be readable in July when a summer resident such as the plaintiff returned to the area, we need but note that these handbills were printed with permanent ink on durable cloth, about 28 inches long and 18 inches wide, and were firmly affixed to the places to which they were attached and that they undoubtedly remain legible for years. And, with respect to the notice in the newspapers, we would but add that no newspaper is published in the particular community in which the plaintiff's property is situated.

[2] The fact that a considerable number of property owners failed to present damage claims within the time specified by the statute is beside the point. What the situation may have been in these cases, we are not told and we do not know. It may well be that the omission to file indicated, not that the owners were unaware of the diversion, but that they did not believe that their properties were sufficiently affected to justify the presentation of claims.

Exhibit C

DYE, J. (dissenting):

The basic issue on this appeal is whether technical compliance with the notice provisions of the New York City Water Supply Act is constitutionally adequate to satisfy the requirements of due process for the taking of property or an interest therein. We think not and feel obliged to express our dissent from the decision about to be rendered.

The appellant is the owner in fee of premises designated on the appropriation map for the Delaware Project as Parcel No. 424 Neversink Riparian No. 4 in Deer Park, Orange County, which is about twenty-five miles downstream from the site of the Neversink Dam and Reservoir in Sullivan County. It is alleged that as a result of such public work her property was adversely affected and seriously damaged. Her claim for compensatory damage, like that of many others, filed more than three years after the vesting has been rejected for untimeliness (K41-18.0).

The New York City Water Supply Act, Title K41, Administrative Code of the City of New York, prescribes the procedures to be followed by the Board of Water Supply in acquiring real estate, easements and rights affecting real property required for its water supply system. K41-8.0 relates to the manner in which notice shall be given for the appointment of commissioners of appraisal for the purpose authorized.

In pertinent part that section provides: "The corporation counsel shall give notice in the City Record, and in two public newspapers published in the city of New York and in two public newspapers published in each other county in which any real estate laid out on such map may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal * * * Such notice shall be so published, once in each week,

in each of such newspapers, for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate to be so taken or affected."

When the city undertook the construction of the "Delaware Project" for the use of its water supply system it, technically, complied with all prescribed procedures including the publication and posting of notice of the application for the appointment of commissioners of appraisal.

The affidavits establish that *the publication in Orange County was made in newspapers situate in the rural communities of Chester and Warwick located many miles from the subject property and with no circulation in the community where the premises were located* although at the time there were available newspapers in the nearby communities of Port Jervis and Middletown. We note too that twenty-two hand bills were posted on trees along Highway Rt. 209 and on trees along the easterly and westerly banks of the Neversink River for a distance of about one hundred feet on either side of certain bridge crossings. The posting and publication were done in the month of January and, although in compliance with the letter of the statute, such publication and posting in such remote places at a time when it was known that the subject premises would be vacant it seems to me fail to comply with its spirit and intent and as matter of fact failed to give this plaintiff and numerous others, similarly situated, any reasonable opportunity of knowing that such a proceeding was pending.

It is also significant that of the four hundred and twenty-two numbered parcels affected or taken and designated on the appropriation map, the fee owners of two hundred

and twenty-four of such parcels—something more than half—failed to file in time and these figures include only those riparian parcels and exclude those which have appurtenant easements for use of the river, as admitted by defendant's answer. Of that number, the great majority are owners of property located in a section remote from the actual dam project. We cannot believe that all of these owners, if apprised of the intended condemnation, would for their own reasons fail to act to protect their interests.

In our view, the statute relied on is inherently defective since no provision is made for personal service, or any adequate substitute. It is, of course, recognized that personal notice may not always be possible, but that affords no reason why a statute should omit reasonable requirements and depend only on publication and posting of the kind provided by this statute. This statute falls short of the constitutional principles dealt with in *Mullane v. Central Hanover Trust Company* (339 U. S. 306, reversing 299 N. Y. 697 which had affirmed 272 App. Div. 772 in which Van Voorhis, J., dissented in an opinion). The principle there enunciated should be followed here. *Mullane* was an accounting proceeding under the common trust fund as established by §100-c of the New York Banking Law. The notice provisions were challenged as contravening constitutional due process for lack of provision for adequate notice. The notice there provided was a constructive one by publication. As Justice Van Voorhis pointed out in his dissent, which reasoning was adopted with approval by Justice Jackson writing for a majority in the Supreme Court of the United States, "The fundamental requisite of due process of law is the opportunity to be heard." (*Grannis v. Ordean*, 234 U. S. 385, 394). As Justice Jackson expressed it, "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether

to appear or default, acquiesce or contest, * * *" * * * * is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457; * * * *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398 * * * 176 U. S. 398 * * * the reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected."

The statute now before us does not satisfy these elemental tests since it makes no provision for the giving of personal notice of a pending application for the appointment of commissioners, but relies solely on a defective constructive form of notice. The essential thing is notice. It is only when such notice cannot be given personally that resort should be had to a substitute or alternative method such as publication and posting, and then it must be done in a manner calculated to afford actual notice. Here personal service is not required, and no personal service was made although such a requirement could have been easily met since the city knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given. If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected.

It cannot be disputed that due process "requires that an owner whose property is taken for public use must be given a hearing in determining just compensation, and the right to a hearing is meaningless without notice (*Walker v. City of Hutchinson*, 352 U. S. 112)."

Furthermore, it is apparent from the opinion written in the court below and their holding of constitutional

validity was not free from doubt because they added as an additional ground for affirmance that "In our opinion the publication, posting and *patently visible effect of the diversion proceedings on the Neversink over a three-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions.*" However that may be, as a comment, it affords no substitute for the fundamentals of due process, that is, a notice reasonably calculated under all the circumstances to apprise a party of the pendency of the action and afford an opportunity to be heard.

The plaintiff's complaint alleges a cause of action to restrain the diversion on constitutional grounds. The passage of time prevents the granting of that relief but does not prevent a determination of the constitutional question and thus afford this plaintiff an opportunity to have her claim filed and to be heard on the issue of damages for the appropriation. Such a result gives the plaintiff her day in court which so far has been denied—not because she defaulted or acquiesced—but because she never had notice of the pendency of the proceeding sufficiently adequate to satisfy constitutional due process for the taking of her property.

The judgment appealed from should be reversed, with costs in all courts, and plaintiff's cross-motion for judgment on the pleadings granted.

. . . . . .

Judgment affirmed, with costs. Opinion by Fuld, J. All concur except Dye, J., who dissents in an opinion in which Van Voorhis, J., concurs. Foster, J., taking no part.

Exhibit D.

Administrative Code of the City of New York.

TITLE K41-8.0.

(New York City Charter and Administrative Code, Annotated, vol. 5, pp. 558-559, 1957 ed., William Press, Inc.)

§K41-8.0. NOTICE OF APPLICATION FOR APPOINTMENT OF COMMISSIONERS OF APPRAISAL—The corporation counsel shall give notice in the city record, and in two public newspapers published in the City of New York and in two public newspapers published in each other county in which any real estate laid out on such maps may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal which notice shall specify the time and place of such application, shall briefly state the object of the applications and shall describe the real estate sought to be taken or affected. A statement of the real estate to be acquired or affected for the purpose of carrying out the said plan or plans or in any part thereof with separate enumerations of the numbers of the parcels to be taken in fee, and of the numbers of the parcels in which an easement is to be acquired, together with the route of the tunnels and aqueducts by courses and distances and of the greatest and least width of its required easement or parcel of land with a reference to the dates and places of filing such maps, shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be so published, once in each week, in each of such newspapers for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause

copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected. After the original appointment of commissioners of appraisal pursuant to the provisions of this article, the corporation counsel may apply at a Special Term of the Supreme Court in the same judicial district where application for such original commission was made for the appointment of a successor commission, upon first giving ten days' notice by advertisement in the newspapers herein above described of his intention to make such application.

Exhibit E.

No. 361

Court of Appeals,
State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of January, in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond,
Chief Judge, Presiding

Raymond J. Cannon, Clerk

Remittitur January 25, 1962

(Seal)

MADELINE C. SCHROEDER,

Appellant.

vs.

THE CITY OF NEW YORK,

Respondent.

BE IT REMEMBERED, That on the 27th day of October in the year of our Lord one thousand nine hundred and sixty-one, Madeline C. Schroeder, the appellant—in this cause, came here unto the Court of Appeals, by Krieger & Scheinman, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment

of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis B. Scheinman of counsel for the appellant—, and by Mr. Theodore R. Lee, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Exhibit F.

SUPREME COURT OF THE STATE OF NEW YORK.

SULLIVAN COUNTY.

MADELINE C. SCHROEDER,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

MADELINE C. SCHROEDER, the above named plaintiff, having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, Third Department, entered in this action in the office of the Clerk of the County of Sullivan on the 11th day of August, 1961, affirming the judgment entered therein on the 8th day of June, 1960, in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed with costs and a remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Sullivan, and an order having been entered thereon, making the judgment of the Court of Appeals the judgment of this Court and directing the entry of a judgment of affirmance herein with costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein; and the costs of the defendant having been taxed at $338.63

Exhibit F

Now, on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for the defendant, it is

ADJUDGED that the judgment in this action entered on the 11th day of August, 1961, be, and the same hereby is, affirmed, and that the defendant, The City of New York, recover of the plaintiff Madeline C. Schroeder, the sum of Three Hundred Thirty-eight and 63/100 ($338.63) Dollars costs as taxed, and for execution therefor.

Judgment entered this 9th day of February, 1962.

MILLICENT C. FLYNN
Clerk

Exhibit G.

At a Special Term of the Supreme Court held in and for the County of Sullivan at the Sullivan County Court House in the Village of Monticello, New York, on the 9th day of February, 1962.

Present:

Hon. Lawrence H. Cooke,
Justice.

MADELINE C. SCHROEDER,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

The above mentioned Madeline C. Schroeder, having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, Third Department, entered on the 11th day of August, 1961 in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, with costs;

Now, upon reading and filing the remittitur of the Court of Appeals herein, dated January 25, 1962, it is on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for the defendant,

Exhibit G

ORDERED, that said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court and that the judgment entered herein in the office of the Clerk of the County of Sullivan on August 11, 1961, be, and the same hereby is affirmed, and that a Judgment of this Court be entered herein affirming said Judgment with the costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein.

Enter in Sullivan County

LAWRENCE H. COOKE
Justice of the Supreme Court

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Office-Supreme Court, U.S.
FILED
MAR 21 1962
JOHN F. DAVIS, CLERK

(36742)

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 75

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
THEODORE R. LEE,
WILLIAM A. KAERCHER,
of Counsel.

INDEX

	PAGE
Motion to Dismiss	1
The Statute Involved	1
Counter-Statement of Question Presented	2
Statement of the Case	2
Argument	4
Where, as here, the right acquired was one to divert water flowing past the property of a non-resident owner whose address was not known and the effect of the diversion was visible, notice by publication and posting for six weeks was sufficient under the Due Process Clause of the Federal Constitution	4
Conclusion	11

Citations

CASES:

Mullane v. Central Hanover Bank & Trust Company, 339 U. S. 306 (1950)	4, 5, 10
Huling v. Kaw Valley Railway and Improvement Co., 130 U. S. 559 (1889)	4, 7
Nelson v. City of New York, 352 U. S. 103 (1956)	4
Walker v. Hutchinson, 352 U. S. 112 (1956)	4, 7, 8, 11
New York v. New York, N. H. & H. R. Co., 344 U. S. 293 (1953)	6
Wuchter v. Pizzutti, 276 U. S. 13 (1928)	10
Zucht v. King, 260 U. S. 174 (1922)	11

OTHER AUTHORITIES:

1 Lawyers Edition 2d, p. 1635 *et seq.*	9

Supreme Court of the United States

OCTOBER TERM, 1961

No.

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS

The City of New York, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss this appeal from the final order and judgment of the New York Court of Appeals affirming the dismissal of the complaint, on the ground that it does not present a substantial federal question.

Reported below: 14 A D 2d 183, 217 N. Y. S. 2d 975; 10 N. Y. 2d 522; — N. E. 2d —.

The Statute Involved

Section K41-8.0 of the Administrative Code of the City of New York is printed at pages 24-25 of the appellant's jurisdictional statement. It provides that notice of the application for the appointment of Commissioners of Appraisal in New York City water supply proceedings shall be published in the City Record, and in two public newspapers published in the City of New York and in two public newspapers published in each county in which the real estate affected may be located. Such notices must be

published in each county in which the real estate affected may be located. Such notice must be published once in each week for six weeks immediately previous to the presentation of the petition. And in addition the Corporation Counsel must cause copies thereof to be posted for the same period of time in at least 20 conspicuous places in the vicinity of the real estate to be taken or affected.

This section was derived from L. 1905, ch. 724, § 8 which in turn was derived from L. 1883, ch. 490, § 7. Notice by publication and posting has been the prescribed form of notice in New York City water supply proceedings since 1883.

Counter-Statement of Question Presented

Does notice by publication and posting for six weeks, pursuant to Section K41-8.0 of the Administrative Code of the City of New York of an application for the right to divert water from riparian property of a non-resident owner, whose address was not known to the City, constitute sufficient notice under the Due Process Clause of the Federal Constitution?

Statement of the Case

The appellant, a resident of New Jersey (R. 12), is the owner of certain real estate in New York which is riparian to the Neversink River (R. 11).

The City of New York, as part of its famed Delaware project (R. 20-21), constructed the Neversink Dam and Reservoir on the Neversink River, upstream from the appellant's property (R. 12, 14).

During the construction of the dam and reservoir, early in 1952, the City instituted a proceeding, pursuant to Title K of Chapter 41 of the Administrative Code of the City of New York (hereinafter referred to as the Water Supply Act), to acquire the right, as against owners of properties located below the dam, to divert a portion of the waters

of the Neversink River (R. 12). The City acquired the right to divert on June 9, 1952 (R. 12, 25-26) and actual diversion commenced on June 1, 1953 upon completion of the dam (R. 14, 26).

The appellant did not file a claim for damages in the riparian proceeding (R. 27-28), but in January 1960 (R. 17), six and one-half years after the diversion and seven and one-half years after the acquisition of the right to divert, she commenced the present suit for an injunction restraining the City from diverting water from the Neversink River. The appellant alleged in her complaint that she did not customarily purchase New York newspapers; that she did not see any of the published notices; that she did not observe any of the posters; and that she did not learn that the City had "acquired any portion of her property" or that she "had a right to a claim" until September, 1959 (R. 13-14). Significantly, however, the appellant did not allege that she was unaware of the diversion.

The appellee by its answer interposed the defense of the three year statute of limitations contained in Section K41-18.0 of the Water Supply Act. After the appellant served a reply, in which she admitted compliance by the City with the various steps prescribed by the Water Supply Act but denied that the City had acquired the right to divert water from the river and that her action was barred, the City moved for judgment on the pleadings which motion was granted and the complaint was dismissed. This action of the lower court was sustained on appeal to the Appellate Division and to the New York Court of Appeals.

ARGUMENT

Where, as here, the right acquired was one to divert water flowing past the property of a non-resident owner whose address was not known and the effect of the diversion was visible, notice by publication and posting for six weeks was sufficient under the Due Process Clause of the Federal Constitution.

Due process does not require personal service in every type of proceeding, especially in the case of non-residents. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950).

In *Huling v. Kaw Valley Railway and Improvement Co.*, 130 U. S. 559 (1889), this Court held that as against a non-resident owner notice of the condemnation proceedings by thirty days publication did not violate due process even though the owner had no actual notice.

Even when a resident is involved personal service is not always required. An *in rem* foreclosure of property for arrears of water charges was upheld in *Nelson v. City of New York*, 352 U. S. 103 (1956), where notice was published, posted and mailed to the owner in accordance with the provision of the statute, even though the owner never received the mailed notice which was concealed by his bookkeeper. This Court recognized that publication, where reinforced by other acts such as service by posting and mailing, was sufficient and that personal notice was not indispensable to due process.

The test of the constitutionality of a notice is whether it is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the proceeding. *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306, 314 (1950), cited in appellant's jurisdictional statement (pp. 2, 7). *Walker v. Hutchinson*, 352 U. S. 112, 115 (1956) (Jurisdictional Statement, pp. 2, 7)

The *Mullane* case, *supra*, held that notice by publication alone for the settlement of an account in a common trust fund pursuant to the New York Banking Law, was inadequate as to beneficiaries whose names and addresses were *known* to the trustee. Such notice was held to be adequate as to beneficiaries whose addresses were *unknown* and did not come to the attention of the trustee in due course of business, and the objections to such notice on behalf of the latter beneficiaries, as well as those whose interests were future or conjectural, were expressly overruled even though the interests or addresses could have been discovered upon investigation (339 U. S. 317 318).

Although the complaint in the present case does not allege that the appellee knew the appellant's address, the appellant intimates that the appellee knew the appellant's address (Jurisdictional Statement, p. 7). The fact is that although the appellee, of course, knew the location of the subject property it did not know the appellant's address. Furthermore, the appellee was under no obligation to attempt to ascertain the address of the appellant, because the statute did not require either personal service or service by mail.

This Court in the *Mullane* case recognized that notice by publication would be sufficient if reinforced by other acts when it said (p. 316):

> "It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification."

In the present case the notice was posted as well as published and the diversion of water from the river constituted an entry upon the plaintiff's real estates. Therefore, the notice given in the present case complied with the rule set forth in the *Mullane* case.

New York v. New York, N. H. & H. R. Co., 344 U. S. 293 (1953) (Jurisdictional Statement, pp. 2, 7), involved a railroad reorganization proceeding where the City had a lien for taxes upon specific parcels of land owned by the railroad. The Bankruptcy Act provided that the judge should require "reasonable notice" of the period in which claims should be filed "by publication or otherwise" and should require proper persons to file a list of all known creditors, the amount and character of their claims and their last known post office addresses. The District Court issued an order directing creditors to file their claims by a prescribed date, after which unfiled claims would be barred. The railroad was required to mail copies of the order to the mortgagees and to all creditors who had already appeared in the proceeding. The notice given to other creditors, including the City, consisted of two once-a-week publications of the order in five daily newspapers, only one of which, the Wall Street Journal, was published in New York. The City did not receive a copy of the bar order and did not file its lien claim within the period designated in the order. Although the railroad and the bankruptcy trustees knew of the City's lien the City was not listed as a creditor and although notice was mailed to the railroad's mortgagees, whose lien was subordinate to that of the City, notice was not mailed to the City. If the City had been listed as a creditor in accordance with the statute, notice probably would have been mailed to the City too. It appeared that the City knew that reorganization proceedings were pending in court. However, the time limitation for filing claims was not prescribed by the statute, as it is in the present case, but by the bar order. Under these circumstances, this Court held that such pub-

lication was ineffective to bar the City's claim and that the City had a right to assume that the statutory "reasonable notice" of the bar order, which prescribed the date by which claims had to be filed, would be given. This Court recognized, however, (p. 296) that notice by publication may be justified when the names, interests and addresses of persons are unknown. As previously indicated, the address of the appellant in the present case was not known to the City.

Walker v. *Hutchinson*, 352 U. S. 112 (1956), involved the constitutionality of a Kansas condemnation statute which required a city to give landowners ten days notice of the time and place of the proceeding and further provided that such notice could be given either "in writing . . . or by one publication in the official city paper . . . ." The petitioner's name was not only known to the city but was on the official records. Nevertheless, he was not notified of the proceeding, the condemning authority relying entirely upon a single publication in a newspaper. This Court held that, under the circumstances of that case, the notice by publication fell short of the requirements of due process. The opinion (p. 116) cited the *Huling* case, *supra*, and referred to the fact that the plaintiff in that case (like the appellant here) was a non-resident as a ground for distinguishing the *Huling* case from the *Walker* case where the plaintiff was a resident. In *Walker* there was nothing to reinforce the single publication.

In the instant case the notice was published in the City Record, and in two public newspapers published in the City of New York and in two public newspapers published in each county in which the real estate affected was located. It was published once in each week for seven weeks immediately previous to the presentation of the petition. And in addition the copies thereof were posted for the same period of time in 22 conspicuous places in the vicinity of the real estate taken or affected.

The notices which were posted in the riparian proceeding here were printed with permanent ink on canvas approximately 24¼ inches long and 18 inches wide and firmly affixed to the places to which they were attached. One of the notices was posted on a pole on the westerly side of the Neversink River at the corner of Route 209 and the road to a railroad station (Def. Ex. C; R. 24, 34). As appears from sheet No. 10 of the condemnation map (Def. Ex. A; R. 23, 60) the road to the railroad station from Route 209 was a short dead-end road, over approximately 1200 feet of which it was necessary for the appellant to pass in order to reach her property (Parcel 424). It was therefore almost as though the notice was posted on the appellant's own driveway.

Contrary to the appellant's contention the appellee was very conscientious about the publication and posting of the notices. The notices were published seven times instead of the six times prescribed by statute and twenty-two handbills were posted instead of the twenty prescribed by statute (Def. Ex. C; R. 24, 33). These handbills were posted in the most conspicuous places near the river (Def. Ex. C; R. 24, 33-37). Thus the posting was of such a character as to be reasonably calculated to give these claimants notice.

The *Walker* opinion stated, at p. 115, that "notice required will vary with circumstances and conditions."

A circumstance bearing on the reasonableness of the notice given here was the size and character of the project. The Neversink Dam is approximately 2800 feet in length (Def. Ex. D; R. 25, 42). The reservoir is approximately 5 miles in length with a maximum width of about 1.5 miles and an average width of about one-half mile and a shore line of approximately 18 miles (Def. Ex. D; R. 25, 43). The construction of such a reservoir involves the removal of hundreds of people from the reservoir area, the relocation of highways and utilities and the employment of hundreds

of men, including many local men. The land is cleared of all building and improvements as well as trees and shrubs. Even the remains of the dead are moved from cemeteries in the area to be flooded for reinterment elsewhere. Such proceedings are of great local interest so they are accompanied by a great deal of publicity. Of necessity such proceedings come to the attention of everyone for miles around and particularly to the attention of the owners of properties which are likely to be affected.

The construction of the reservoir and the patently visible diversion of water from the river are circumstances and conditions which, under the doctrine of the *Mullane* and *Walker* cases, may properly be taken into consideration in determining that notice given here was reasonably calculated to apprise interested parties of the proceeding and afford them an opportunity to present their claims.

We submit that under the circumstances the notice required by the Water Supply Act falls well within the constitutional standards referred to in the cases cited and that, accordingly, any attack on the constitutionality of the notice provision of the Water Supply Act must fail. See *Annotation in 1 L. Ed. 2d 1635 et seq.* on "Due process requirements as to notice in condemnation proceedings—Supreme Court cases." Accordingly, under the facts and circumstances surrounding the present case the defense of the Statute of Limitations was properly sustained.

As to the alleged failure of a number of owners to file claims, in a proceeding to acquire riparian rights, as distinguished from one to acquire properties in fee, it may be expected that some owners may not file claims, not because they are unaware of the diversion but because they may feel that their properties are not sufficiently affected to justify the filing of claims. As the index sheet of the taking map (Def. Ex. A; R. 23, 60) indicates, fourteen of the parcels in Neversink Riparian Section No. 4, where the appellant's property is located, are mapped to

"Unknown" owners. In view of the fact that title to the bed of a stream is frequently in doubt and that a riparian owner who can prove title only to the bank of the stream usually proves the same elements of damages as could be proved if title to the river-bed parcels could be established, it is not surprising that claims may not have been filed covering a number of such parcels. Other parcels, mapped to known owners, were unimproved and some of the properties were occupied in such manner as to obtain little, if any, benefit from the river. In any event the failure of owners of other parcels to file claims for damages to their properties does not excuse the appellant for her failure to file a claim within the statutory period.

Wuchter v. *Pizzutti*, 276 U. S. 13 (1928), cited in appellant's jurisdictional statement (pp. 2, 8-9), held that actual notice by service of proposed execution in Pennsylvania did not validate a judgment rendered in accordance with a non-resident motorist statute of New Jersey which provided for service on the Secretary of State but did not require the Secretary of State to mail the notice to the defendant. That case, which was decided in 1928 and in which Justices BRANDEIS, HOLMES and STONE dissented, is apparently inconsistent with the later holding of this Court in the *Mullane* case, *supra*. There notice by publication was held to be sufficient as to beneficiaries whose addresses were not known or whose interests were conjectural or future although it did not appear that they had actual notice and this Court indicated (339 U. S. at p. 318), that notice to the known beneficiaries would have been sufficient if the notice had been served personally or by ordinary mail. After citing the *Wuchter* case, the *Mullane* opinion stated (p. 319):

> "Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances."

Also in the *Walker* case, *supra*, this Court said (352 U. S. at p. 116) that even a letter would have apprised the owner that his property was about to be taken and that he would have to appear if he wanted to be heard as to its value. Thus this Court implied that if the owner in that case had had actual notice, or even if a letter had been mailed to him the decision would have been different. The *Wuchter* case, unlike the present case, was not concerned with the tangible and visible.

In view of the fact that the notice given in the present case clearly complies with the test previously laid down by this Court for the sufficiency of notice in cases of this kind no question remains sufficiently substantial to require review by this Court. See *Zucht* v. *King*, 260 U. S. 174, 176 (1922) where this Court refused jurisdiction of a constitutional question on the ground that the question had ceased to be substantial because of prior decisions.

CONCLUSION

Appellant has presented no substantial question for resolution by this Court. The appeal should be dismissed.

March 19, 1962.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
THEODORE R. LEE,
WILLIAM A. KAERCHER,
of Counsel.

Office-Supreme Court, U.S.
FILED
APR 4 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. 75

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

LOUIS B. SCHEINMAN,
Attorney for Appellant,
Woodbourne, N. Y.

Index.

	Page
Additional Statement of the Case	1
Argument	
The Addresses of Appellant were Known to Appellee	1
The Decision of the Court Below is Irreconcilable with the Recent Decisions of this Court on the Question of Due Process	4
There is a Further Substantial Federal Question Involved in the Reliance by the Court of Appeals Upon a Supposed Visible Effect of the Diversion	16
Conclusion	22

CITATIONS.

Page

Cases:

City of New York v. N. Y., N. H. & Ry. Co., 344 U. S. 293 (1953) 4, 12, 13, 15

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) 19

Gillespie v. Fort Dodge, D. M. & S. Ry. Co., 203 F. 2d 119 (8th Cir. 1953) 12

Huling v. Kaw Valley R. R. & Improvement Co., 130 U. S. 559 (1889) 3

Matter of Huie (Neilson), 6 A. D. 2d 837, 176 N. Y. S. 2d 193 (1958) 14

Matter of Huie (Riehle), 6 A. D. 2d 838, 176 N. Y. S. 2d 197 (1958) 14

McDonald v. Mabee, 243 U. S. 90 (1917) 15

Milliken v. Meyer, 311 U. S. 457 (1940) 15

Mullane v. Central Hanover Bank & Trust Company, 339 U. S. 306 (1950) 3, 4, 9, 10, 11, 12, 15

Walker v. City of Hutchinson, Kansas, 352 U. S. 112 (1956) 4, 11, 12, 13

Wisconsin Electric Power Co. v. Milwaukee, 352 U. S. 948 (1956) 4, 13, 15

Wuchter v. Pizzutti, 276 U. S. 13 (1928) 19, 22

Page

New York Statutes:

Administrative Code of the City of New York, Title K41-18.0 8

Administrative Code of the City of New York, Title K41-9.0 8

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 763.

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS.

Additional Statement of the Case.

The appellant is a resident of New York State, although she is also a resident of New Jersey. She resides at the premises in question during the summer and in Dumont, New Jersey, the remainder of the year (R. 12, par. 11).

Her address at both places was known to the appellee, as will be shown beyond question herein.

ARGUMENT.

The addresses of appellant were known to the appellee.

The appellee gave no personal notice, by letter nor in any other manner to *any* of the property owners along the Neversink River, as the statute did not require the same. Consequently, this claim that appellee was unaware of appellant's address cannot possibly be considered a reason for failing to give some form of personal notice. Instead, it is a much belated excuse which can be seen to be completely untrue for the following reasons.

Prior to the institution of the proceeding, appellee prepared taking maps, and filed a duplicate original in the Orange County Clerk's office on December 5, 1951 (R. 23), a reduced scale copy of same being an exhibit in this case (Def. Ex. A, R. 23).

The index sheet lists the names of the record owners of the parcels taken, and the Court will note that the said Exhibit A, which is the taking map for Neversink Riparian Sec. No. 4, lists Madeline Schroeder as the owner of Parcel 424.

Sheet No. 10 of this map shows the location of Parcel No. 424 (R. 23, Def. Ex. A) and this Court will note that the various parcels are delineated and the river frontages shown to 1/10th of a foot.

These maps were prepared only after deed studies were made by appellee from which deed studies appellee learned the names of the record title holders and the exact amount of river frontages. Appellant's deed recorded in the Orange County Clerk's office, April 19, 1950, in Liber 1154 of Deeds at page 506 (R. 11, par. 1), contains, alongside her name, her address at 30 Seneca Avenue, Dumont, New Jersey. Consequently, when appellee learned her name, it learned her address in New Jersey. Since we must assume that appellee knew the location of the property it was taking, it consequently also knew her address at the premises in question.

Referring to another public record, and since tax bills are mailed in the winter, the tax rolls of this property for the years 1951 and 1952 likewise contained the address of 30 Seneca Avenue, Dumont, New Jersey.

The majority opinion of the New York Court of Appeals paid no heed to this fallacious argument by appellee. In fact, the dissenting opinion said:

> "Here personal service is not required and no personal service was made although such a requirement could have been easily met since the City knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given."

Does the appellee suggest that if it had had an address, it would have mailed a notice? No notices were mailed to anyone.

In no event is this a case of a missing or unknown owner who has disappeared.

Insofar as the question of residence is concerned, the appellant owns a home and resides at the premises in question during the summer and resides in New Jersey during the remainder of the year (12). Aside from the question of domicile, she is a resident of New York as well as New Jersey. The same postage stamp would have carried a letter to New Jersey as well as to the property. Also, a letter addressed to the premises in New York in January would have been forwarded without additional postage to New Jersey.

Consequently, although *Mullane* clearly undermined *Huling v. Kaw Valley R. & Improvement Co.*, 130 U. S. 559 (1889), said latter case cannot possibly be applicable because of appellant's residence in New York.

However all of this may be, why is it necessary to argue whether or not appellant's address was known, or whether or not she was a resident? It is sufficient to determine in this case that the *statute itself* makes no provision whatever for any form of personal notice, nor even any attempt at it. It is obvious from the decisions below that there is no state court construction of this statute requiring personal notice of any kind, or requiring anything additional to what the statute provides.

Consequently, the statute on its face is short of the minimum requirements of due process.

The decision of the Court below is irreconcilable with the recent decisions of this Court on the question of due process.

There is no way that the majority holding in the Court below can be considered harmonious with *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306 (1950); *City of New York v. N. Y., N. H. & H. Ry. Co.*, 344 U. S. 293 (1953); *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112 (1956); and *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948 (1956).

The holding that is the common denominator to each of the above cases is that constructive notice alone does not comply with due process where the means are at hand to give some form of personal notice, at least an ordinary letter.

The statute here is clearly encompassed by the foregoing.

The manner of the publication of the newspaper notices in this case could not reasonably have been expected to give any notice to property owners in the area of the taking.

The requirements of the statute for publication in the City Record and in two newspapers published in New York City have no bearing upon the question of notice to the property owners in the upstate counties, but are required for the information of officials of the City of New York and possibly its own inhabitants. This leaves only the publication for six weeks in two newspapers published in the county, and the posting of 20 handbills "in the vicinity of the real estate" to be taken or affected.

There is no requirement in the statute that the newspapers selected have any circulation whatever in the taking area. This subject property is approximately 7

miles from Port Jervis and 10 miles from Middletown, both *incorporated cities* in Orange County. Both the Port Jervis Union-Gazette and the Middletown Times Herald not only had circulation in the area of the taking, but were also delivered.

Yet appellee did not advertise in either of these papers. It published instead in the Chester Bulletin of Chester, N. Y., *a third class village*, and in the Valley Dispatch of Warwick, N. Y., an *unincorporated hamlet*, neither of which papers had, nor could have been expected to have, any circulation whatever in the taking area, said latter communities being located at least 20 and 30 miles, respectively, from the taking area, and beyond the two cities that were by-passed.

This is not an isolated phenomenon. In adjoining Sullivan County through which the Neversink runs on the easterly end, in taking areas near Monticello, the county seat, in which no less than three newspapers are published, the appellee went all the way to the westerly boundary of the county, a distance of 35 to 40 miles from the taking area, to publish in a small newspaper in Callicoon, and also in a newspaper in Liberty, 12 miles beyond Monticello.

This hiding of the notices was obviously deliberate. As Judge Dye said in his dissent in the Court below:

> "If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected."

The posting of handbills under this statute cannot be considered to be a form of personal service, nor of substituted service.

Handbills were not posted on each property nor affixed to each dwelling.

In Section No. 4 there are 96 numbered river front parcels, and a great many upland parcels with deed rights-of-way across numbered parcels to the river, which upland parcels are not shown on any map and which property rights were treated by appellee as if they did not even exist. For example, in Section No. 4 there is located a development known as Meyers Grove which has in the neighborhood of 100 properties all of which have deed rights to bathe, swim and fish in the Neversink River.

For all of these properties, the statute required 20 posters. These properties extend along at least seven miles of river, or 14 miles of river banks. The statute provides no minimum standards for the type of handbills. In this case cloth posters were used, but the usual onion-skin carbon copy, common in foreclosure notices, election notices, etc., would still comply for lack of statutory standard.

Nineteen were posted on trees and three on poles, said posting having been done on January 22, 1952 (R. 33-37).

Since the Neversink River had been developed as a summer resort area, it was known that most properties would be vacant at that time of year.

It is clearly apparent that appellee intended even the handbills to attract as little attention as possible. The subject property is near the small hamlet of Cuddebackville. This community has a post office, a firehouse, a town clerk's office, a school, at least two general stores as well as a church and gas stations.

Section No. 4 extends from the vicinity of Huguenot and runs through Godeffroy (see map, Exhibit A, *supra*).

Huguenot has a post office, a Grange Hall, a municipal building and office, and general store.

Godeffroy also has a post office, general store and gas station.

Yet, not one handbill was posted in any of these public places!

Any design to attract attention to the handbills would have utilized these places where the posters could be sheltered from the weather and seen and read by local residents. Posting on trees and poles along lanes, dirt roads in the forest and at highway at the time of year it was done, would not accomplish this purpose. In fact, the notice could not be read from a passing automobile and, in order to be read, would require people to walk off the road onto private property, if, in the first place, it could be distinguished from the ordinary "No Trespassing, Hunting or Fishing" signs.

The notices did not contain the names of the persons affected, nor did they advise that any action was required to ensure compensation.

In fact, the notice is merely a notice of motion relating *only* to the application to acquire the right to divert, and returnable on March 14, 1952 (R. 30). Even if seen and read by a property owner, he would have no way of knowing that on the basis of this notice he was to file a claim for compensation, or where, when or how.

The notice referred to a petition and said:

> "described in the petition herein"

which notice was dated January 10, 1952 (R. 30-32), while the petition referred to did not come into existence until February 15, 1952 (R. 48-49).

The statement of the Court below, in the footnote, that the posters were "firmly affixed" is an unwarranted conclusion without basis. It is only known that most disappeared shortly after the posting. A poster attached to the bark of a tree trunk should not really be expected to withstand sleet, ice, snow and rain, and remain on the tree for any period.

The point of all of the foregoing is that the posting of notices was nothing more than merely another form of publication.

It can, by no stretch of the imagination, be considered to be a personal notice to any individual property owner.

Even under those statutes which permit the posting of a notice on the door of a dwelling as a form of substituted service, there are always the requirements (1) that personal service cannot with due diligence be made, and (2) that the affixation of the notice be on the premises of the owner affected.

Since the statute here provides no such standards or requirements with respect to the handbills, such posting does not take this statute out of the rule of the above cited cases.

This Court might be interested in knowing that despite the provisions of K41-18.0 for filing claims with Commissioners of Appraisal, that claims are actually filed with the Corporation Counsel of the City of New York at his office maintained by him in Kingston, Ulster County, New York. The reason is that Commissioners of Appraisal are private citizens, one from the county in which the property is located, one from the City of New York, and the third generally from a neutral county (K41-9.0). They have no office and no announcement or notice of any kind is given when they are appointed of their names and addresses or where claims are to be filed.

It is certainly true that when the statute in question was enacted in 1905, that the counties involved were rural agricultural counties, very sparsely populated, and with very few newspapers. However, by 1952, Orange and Sullivan Counties had developed extensively, particularly in the use of their rivers and lakes as summer resort facilities.

While in 1905 the publication provided by statute may have better accomplished its purpose, the figures of claims not filed in time most eloquently and dramatically prove beyond question that the notice was in fact, and as a practical matter, totally inadequate in 1952.

An ordinary letter addressed to each property owner, advising him of the taking and where to file his claim, and that no further notice would be given, would have avoided this outrageous situation.

Mailing is a simple requirement. Addresses are easily ascertainable from deeds and tax rolls. And then, only if a name and address cannot for some unusual reason be found, posting on the particular premises of the unknown owner could be permitted as the best substitute available.

A condemner should not complain of such procedure. In fact, when the New York State Thruway was constructed from New York City to Buffalo, a distance of 400 miles, it was required under Section 30 of the Highway Law to personally physically serve each owner with an appropriation map and description of his land being taken.

Judge Fuld in the court below sought to distinguish this case from *Mullane* on the ground that the subject of the action here was real property, evidently distinguishing the fact that in *Mullane* the property dealt with was personal property. The learned jurist evidently felt that here there was a physical taking and that consequently, some additional notice was provided by the actual diversion.

We respectfully point out, however, that he overlooked the *Walker* case in which, as here, there was a taking of real property. The learned Court below also completely overlooked the fact that there was no diversion and nothing whatever done in the river until a year and three months *after* the return date of the application which was the subject of the published notices. At the return date

of March 14, 1952, property owners were entitled to present objections to the taking.

Under various New York statutes (e. g., Condemnation Law) the property owner has a right to object to the eminent domain proceedings taken to acquire his property. On the application to condemn (as here) the property owner can raise any one of a number of available objections. For example, on the return date in Section No. 1, four attorneys appeared for various property owners, filed answers to the petition, raising several objections. The main objection was that the taking was not reasonable and that it was not necessary for appellee to take all of the water in the river when considering the needs of the lower riparian owners. The Court reserved decision, and after extensive negotiations, a stipulation was made whereby the answers were withdrawn and the city agreed to release certain quantities of water into the stream. This stipulation was incorporated into the Order of Condemnation. The Court will note the last decretal paragraph in the Order of Condemnation on page 53 of the record, the releases the appellee is required to make. This is the result of the appearances on the return date in Section No. 1, and the objections there made.

The Court will note, therefore, that the right to appear and be heard on the return date is an exceedingly important right, and completely separate and apart from the later proceedings dealing with compensation.

So how then can it be said that the actual diversion which took place more than a year *after* the return date provided any notice of the application to condemn?

In *Mullane* this Court said:

> "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

In *Mullane* this Court took note of a notice which "does not even name those whose attention it is supposed to attract" and also made reference to a situation where the person affected "makes his home outside the area of the newspapers normal circulation" both of which quotations are applicable here.

Furthermore, it is apparent here that there was a deliberate attempt by appellee to seek remote newspapers least likely to give notice, and to post in remote areas during the time of year when it was known that a great number of the properties would be vacant.

Mullane caused much interest to legal writers, Law Revision Commissions and State Legislatures and also met with much favor.

36 Iowa L. Review 47 (1950);
39 Iowa L. Review 665 (1954);
100 U. Pennsylvania L. Review 305 (1952);
30 Mich. St. B. J. 12 (1951);
50 Mich. L. Review 124 (1951);
Perry, "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements," Current Trends in State Legislation 32 at 118 (1952).

Of course, New York revised Section 100 (c) (12) of the Banking Law to require mailing.

A subsequent article in 39 Iowa L. Review 665 advised that North Carolina revised its N. C. Gen. Stat. §§1-98, *et seq.*, relating to publication and now requires mailing, and that Iowa (Iowa Rule 60, Rule 60.1 added) changed its statute to require mailing of notice or an affidavit that a diligent inquiry was made and that no address was found.

As a matter of fact the Iowa Law Review article above-mentioned actually forecast the *Walker* case. At page 671 it mentioned the inadequacy of the Kansas statute in view of *Mullane!*

Mullane was followed by *Gillespie v. Fort Dodge, D., M. & S. Ry. Co.*, 203 F. 2d 119 (8th Cir., 1953), a bankruptcy case wherein notice by publication was held inadequate where actual notice was possible.

Also following *Mullane* was *City of New York v. New York, N. H. & H. R. R.*, 344 U. S. 293 (1953), in which the rationale of *Mullane* in point was affirmed.

In the most recent decision, the Court reaffirmed the rule laid down in the *Mullane* case. This Court struck down a Kansas statute which required in a condemnation proceeding, notice by either publication or personally, the notice actually given in the *Walker* case having been by publication. The Court said (*Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, 1956):

> "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. *Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.*" (Italics added.)

Walker is the most recent United States Supreme Court case on this question that we know of. It is of interest to know that the situation is more aggravated here and more deserving of relief than that situation existing in said *Walker* case. In said case, Mr. Lee Walker's property was taken and commissioners met without his knowledge and made to him an award for his property in the amount of $725. Mr. Walker was not satisfied with said award when he learned of it, and sought resort to the courts.

In the instant case, Miss Schroeder received and shall receive nothing for her property, unless she prevails here.

At the same term of court with *Walker* was *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948. This case was remanded on the same grounds as *Walker*. Said case involved the levy of assessments by Milwaukee against owners of property abutting on a certain street, notice having been given by publication only, under the city charter. The complaint in a first action asking for cancellation of assessment on grounds of unconstitutionality of statute was dismissed on demurrer. The Supreme Court of Wisconsin, after *Mullane*, and because of an evenly divided court, affirmed 263 Wisc. 111, 56 N. W. 2d 784.

After the decision of the U. S. Supreme Court in *City of New York v. New York, N. H. & H. Ry. Co., supra*, Wisconsin Electric started its action over again, for no new reason other than in view of the *City of New York* case reaffirming and strengthening *Mullane* it decided this time to go to the U. S. Supreme Court. Again a demurrer to the complaint was sustained in the Circuit Court, and on appeal the Wisconsin Supreme Court again affirmed, but this time only on the principle that there must be finality to litigation, and on the theory of "law of the case." 272 Wisc. 575, 76 N. W. 2d 341.

The U. S. Supreme Court remanded, 352 U. S. 948, order amended 352 U. S. 958; and the Supreme Court of Wisconsin reversed, 81 N. W. 2d 298.

The appellee now admits on page 7 of its motion to dismiss, in a converse manner, that where names and addresses are known that publication alone is inadequate. In speaking of the *New York v. N. Y., N. H. & H. Ry. Co.* case, it says:

> "This Court recognized, however (p. 296), that notice by publication may be justified when the names, interests and addresses of persons are unknown."

Appellee cannot and does not claim that appellant was an unknown owner, nor one who was missing or who had disappeared, but merely that it was unaware of her address.

The one and only reason for the failure to mail notices, and there was no other reason, was that the statute itself failed to require it.

The suggestion in the motion to dismiss and also contained in a footnote to the opinion of the learned Court below to the effect that the great number of claims not filed in time may possibly have been due to a lack of interest on the part of the property owners, is the grossest speculation.

It is reasonable to say that if an owner filed his claim, but late, that he does feel that he was affected and that he is entitled to compensation.

There are a large number of cases involving late filed claims in the lower courts in New York. Two of these cases, *Matter of Huie (Neilson)*, 6 A. D. 2d 837, 176 N. Y. S. 2d 193, and *Application of Huie (Riehle)*, 6 A. D. 2d 838, 176 N. Y. S. 2d 197, are representative cases which, in themselves, involve a large number of claims.

We have estimated that the total number of claims actually filed, but late, and pending was about 200, and this figure was never disputed. On the other hand, appellee, which has an exact record of the number of claims filed with them, has never advised any Court as to such number.

We also point out that undoubtedly many property owners much interested failed to file claims when learning of

the proceedings after the Statute of Limitations had expired, simply because they were advised that it was too late.

In any event, the speculation by the learned Court below of the possibility of disinterest by property owners is of the grossest type and completely unsupported by any factual basis.

Due process is based upon the traditional notions of fair play and substantial justice.

Mr. Justice Holmes said, in *McDonald v. Mabee*, 243 U. S. 90:

> "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. *Baker v. Baker, E. & Co.*, January 8, 1917 (242 U. S. 394, *ante*, 386, 37 Sup. Ct. Rep. 152)."

In *Milliken v. Meyer*, 311 U. S. 457, Mr. Justice Douglas stated (at p. 463):

> "Its adequacy so far as due process is concerned is dependent upon whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice *(McDonald v. Mabee, supra)* implicit in due process are satisfied."

In the case at bar, we have strict compliance with the letter, certainly not the spirit of a statute, the traditional notions of fair play and substantial justice being completely absent.

There is truly no way that the decision of the Court below can be harmonized with the *Mullane, City of New York, Wisconsin Electric Power Co.* or *Walker* cases. We cannot think of any reasonable exception to the great

principles enunciated in said cases that could justify the decision appealed from. We therefore respectfully submit that there is a substantial federal question.

There is a further substantial Federal question involved in the reliance by the Court of Appeals upon a supposed visible effect of the diversion.

The learned Court below undoubtedly placed great reliance upon what it considered to be an additional form of notice, saying that it was of considerable significance that the effect of the diversion was clearly apparent long before the expiration of the Statute of Limitations.

This, of course, can relate only to the question of compensation.

We had pointed out previously in the jurisdictional statement that the diversion occurred in this case two years before the expiration of the statute, and could just as easily have occurred after the Statute of Limitations had already expired, which actually was almost the case in the City's diversion of the Roundout (Jur. Stmt., p. 9); and further that this was a motion on the pleadings alone and this assumption, vigorously denied, was made without any basis in this record (Jur. Stmt., p. 9).

Actually, we say by way of explanation, the effects of the diversion are not clearly visible to a layman, except at a point close to the dam.

The Neversink Dam diverted the river in its entirety at Neversink, Sullivan County, New York, except for certain nominal releases which the taking order required the City to make.

The stream below the dam and within a short distance of the dam is therefore, at times, exceedingly low, the diversion within a mile or so downstream from the dam

being close to 100 per cent. But as the stream winds and turns in its travels to the Delaware River, about 35 miles below the dam, it picks up substantial quantities of water from its tributaries and from ground water in the drainage area of the stream, so that as one travels further downstream the percentage of diversion decreases, the same at the Schroeder property being in the neighborhood of a 50 per cent diversion.

The diversion of a percentage of the stream, even a very high percentage of the stream, does not necessarily substantially lower the height of the stream. The most drastic effect of the diversion is its decrease in velocity of flow.

For example, a natural pool in the river will be full, whether there are 30 million gallons per day coming into it, or 300 million gallons per day. The thing that changes in such an instance is its velocity.

Prior to the diversion, the Neversink was known as a "flashy" stream and on the average of once a year reached flood stage in varying degrees. This high quantity of water scoured and cleansed the bottom of the stream to its natural sand and gravel stone bed.

In its natural condition its temperature was cool at its headwaters and normal in the rest of the stream. The diversion has impounded the waters in the Neversink Reservoir. Under the taking order of March, 1952, minimum releases must be made. However, under the United States Supreme Court decree appointing a River Master, a formula was established whereby when the water in the Delaware River at Montague, New Jersey, falls below a certain point, the City must release additional quantities from its reservoirs. The result of the foregoing is that at times the City releases the minimal quantities from the reservoir at Neversink and at times very substantial quantities. In fact it is true that at times of drought there is

sometimes more water in the river than there would have been without a diversion because of the United States Supreme Court decree.

The waters released are through the bottom of the dam, the temperature being approximately 39.2 degrees F. at the release works.

Consequently, when the releases are high the temperature in the river for many miles downstream is very low. On the other hand, when the releases are low, because of small quantities and velocity of flow the temperature in the river is unusually high. This situation is drastic to fish life, native trout having been practically eliminated from the stream.

The decrease in velocity, although not necessarily decreasing the depth, has reduced the carrying capacity of the stream, silt and sedimentation have coated the stream bottom; algae is most proliferous. The freshets or floods being absent, this accumulation on the bottom continues to build up over the long period of years. Fishing is destroyed. Bathing and swimming made more and more uncomfortable as time goes on.

Yet a layman, having no understanding of the technical reasons for the effects of the diversion and looking only at the height of the stream, knowing that the stream fluctuated greatly in its natural pre-diversion state, at a point 25 miles downstream from the dam in a different county, as at the subject property, could not be expected to conclude at a glance that there had been an artificial diversion by the City of New York for water supply purposes for which he was entitled to be compensated.

The proof of this is found very clearly in the fact that 78 out of 96 riparian numbered parcels in Section No. 4 failed to file their claims in time. Appellee now owns these interests, and refuses to pay compensation.

In *Wuchter v. Pizzuti*, 276 U. S. 13 (1928), a New Jersey motor vehicle statute failed to provide that the Secretary of State mail process to the non-resident. However, in that case, the Secretary of State nevertheless did so. The defendant did not appear and judgment was taken against him.

In a subsequent suit on the execution, the defendant attacked the constitutionality of the New Jersey statute and this Court held:

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by statute. Not having been directed by the statute, it cannot therefore, supply constitutional validity to the statute or to service under it. *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co. v. Stock Yards Company*, 212 U. S. 132, 144; *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127, 138; *Security Trust Co. v. Lexington*, 203 U. S. 398, 409; *Stuart v. Palmer*, 74 N. Y. 183, 188; *Berryhill v. Sepp*, 106 Minn. 458."

Although it is correct that Justices Holmes and Brandeis dissented, Mr. Justice Stone dissented upon other grounds. These dissents do not lessen the import and strength of this case, particularly since an examination of many cases mentioned in Shepard's citations would clearly show the same to be very much the law today. In fact, said case was cited by this Court in the *Walker* case.

In the case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915), this Court said on page 424:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, which involved the validity of a statute providing for as-

sessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said:

"'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and then opportunity to be heard.'

"The soundness of this doctrine has repeatedly been recognized by this Court. Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes:

"'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute (*Stuart v. Palmer*, 74 N. Y. 183).'

"So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 151, 28 Sup. Ct. Rep. 47, the Court said:

"'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' • • • and in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said:

"'The law itself must save the parties' rights and not leave them to the discretion of the Courts as such.'"

We respectfully urge that in this case additional notice beyond what is required in the statute must not be left to the grace or favor of the City of New York.

If the statute be upheld, the next condemnation by appellee may have a diversion after the expiration of the Statute of Limitations; sections 20 miles long instead of 7 with the same number of notices; handbills on onion-skin paper on trees in the forest in January. We know, however, that appellee could not do much worse on the newspaper notices, having already shown its inclination to select those most distant from the property but still within the boundaries of the county.

The statement in appellant's motion to dismiss, on page 3, that although appellant alleged lack of knowledge of the taking of her property or of her right to a claim, that she did not allege that she was unaware of the diversion, is nothing more than a play on words. The complaint leaves no doubt as to her lack of knowledge which should not be surprising in view of the fact that 81 per cent of riparian owners in Section 4 failed to file in time.

The suggestion in the motion to dismiss that the very existence of the project provided notice is fallacious. The Neversink project was commenced in 1941. There was nothing to suggest the 1952-1955 period as the precise time to file claims. Further, the premises in question are 25 miles downstream, in a different county and at least 40 road miles away. It is, therefore, unreasonable in fact, and contrary to law, to adopt an assumption that the project was notice to this property owner as to when and where to file a claim.

The suggestion that this appellant had notice because a handbill was attached to a pole alongside a roadway 1,200 feet from her property is inadequate in fact and in law. To speculate or conjecture that posters attached to trees or poles withstood the rigors of weather, removal by people, and any other hazards, to remain over an extended period of time, under pain or penalty of depriving a person of property without notice and compensation, is irresponsible.

The point here is that no notice other than that provided in the statute, or required by state court construction, can cure the defect of the statute by supplying constitutional validity to it, or to service under it (*Wuchter v. Pizzuti, supra*, and cases therein cited).

Appellant never appeared in the proceeding and waived nothing.

The conclusion by the Court below that the diversion provided notice, without factual basis in this record, and vigorously denied by appellant, deprived appellant of a right to a trial on this question of fact.

Whether the Court below, in interpreting the 14th Amendment, can make assumptions that notice was fortuitously had in a manner provided neither by the statute nor by court construction of same, and provided constitutional validity to the statute, raises a substantial federal question.

CONCLUSION.

We respectfully submit that appellant has presented a substantial federal question. Appellant requests that the motion to dismiss be denied, that this Court note jurisdiction and reverse the judgment and orders appealed from.

Dated: April 2, 1962.

Respectfully submitted,

LOUIS B. SCHEINMAN,
Attorney for Appellant,
Office & Post Office Address,
Woodbourne, New York.

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Supreme Court of the United States

October Term, 1962

No. 75

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF.

GOLDSTEIN & GOLDSTEIN,
Attorneys for Applicants,
274 Broadway,
Monticello, N. Y.

BENJAMIN M. GOLDSTEIN,
Of Counsel.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

Supreme Court of the United States

October Term, 1961.

No. 763.

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF.

The following law firms and attorneys hereby apply to this Court for permission to file a brief as *amicus curiae* on the question of the jurisdictional statement herein.

The Corporation Counsel of the City of New York has refused to give his consent thereto.

The names and addresses of the applicants are as follows:

Goldstein & Goldstein	274 Broadway, Monticello, New York
Cooke & Willis	236 Broadway, Monticello, New York
Newberg & Sakofsky	South Fallsburgh, New York
Harry C. Resnick	South Fallsburgh, New York
William F. Norton, Jr.	26 Broadway, New York 4, New York

The interests of the applicants herein are as follows:

Each of the above-named applicants represent clients who are owners of riparian properties along the Neversink River downstream from the Neversink Dam, several

of whom are upland owners having rights of way in their deeds across riparian properties and to the use of the Neversink River for various purposes including mainly fishing, bathing and boating. These properties include homes, acreage, hotels, summer motels, summer bungalow colonies and businesses. These property owners above referred to, did not file their respective claims for compensation within the three year period fixed by the Water Supply Act for the reason that these owners did not know of the diversion of the said river by the City until after the City has claimed that the statute of limitations for the filing of claims had expired.

The applicants herein have been following this case through the New York Courts as the interests of their respective clients are vitally affected by its outcome.

The applicants alone represent approximately seventy (70) claims which the City claims to have been filed too late although there are a great number of other claims represented by other counsel who are not applicants here and who are likewise vitally interested in the results.

The undersigned have read the appellee's motion to dismiss and have discussed with Mr. Louis B. Scheinman, attorney for appellant, appellant's intended brief in opposition to said motion to dismiss.

Mr. Scheinman has indicated to us that he intends to argue in his brief that the statute in question is constitutionally defective in that it fails to require notice reasonably calculated to attract the attention of interested parties, and particularly that the statute is inherently defective in failing to provide for the simple expedient of mailing. He does not stress therein, and deems it unimportant to stress, the actual and deliberate manner in which the constructive service was made so as to attract

the attention of as few interested parties as possible. In short, his argument is that he is entitled to a reversal of the judgment below because of the defective statute, and that the manner of publication merely serves to illustrate the statutory defects.

Applicants feel that such an argument is not complete and wish to argue in their proposed brief that the actual manner in which the service here has been made has caused a deprivation of property without due process of law in contravention to the 14th Amendment of the United States Constitution.

Applicants also wish to argue the failure of the statute to provide for the indexing in the County Clerk's office against the names of the record owners of the taking and the nature and extent thereof so that a title search would reveal such taking to a subsequent purchaser for value and without notice.

Applicants also wish to point out and argue the effect of this statute upon the interests of mortgagees, infants, incompetents, and absentee owners.

Applicants also wish to argue that the said statute had failed to provide for the payment of even a nominal sum of money for the deprivation of these known owners of their rights to the uninterrupted flow and use of the waters of the Neversink River in its natural state and stage.

We believe that these matters will not be covered in the briefs on this motion.

Permission to file an *amicus curiae* brief is therefore most respectfully requested.

Dated: March 29, 1962.

Respectfully submitted,

GOLDSTEIN & GOLDSTEIN,
Attorneys for Applicants,
274 Broadway,
Monticello, New York.
Monticello 1950.

BENJAMIN M. GOLDSTEIN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 73

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

OBJECTIONS TO APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellee,
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New York 7, N. Y.

SEYMOUR B. QUEL,
THEODORE R. LEE,
of Counsel.

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INDEX

	PAGE
Objection to Application for Leave to File *Amicus Curiae* Brief	1
Argument	2
In view of the fact that the points which the applicants seek to argue are extraneous to the record, or relate to new issues not raised by the parties, or were adequately presented by the parties, the application for leave to file an *amicus curiae* brief should be denied	2
Conclusion	6

AUTHORITIES

5 Corpus Juris Secundum, *Appeal & Error*, § 1344	3
5 Corpus Juris Secundum, *Appeal & Error*, §§ 1326, 1327	4
3 Corpus Juris Secundum, *Amicus Curiae*, §§ 3c, 3e (2), (8), (9aa)	5

Supreme Court of the United States

OCTOBER TERM, 1961

No. 763

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

OBJECTIONS TO APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

This memorandum is submitted in opposition to the application of Messrs. Goldstein & Goldstein and certain other attorneys for persons who are not parties to this case for leave to file a brief as *amicus curiae* in opposition to the appellee's motion to dismiss the appeal on the ground that it does not present a substantial federal question.

The question presented by this appeal, briefly stated, is whether notice by publication and posting, pursuant to Section K41-8.0 of the Administrative Code of the City of New York (hereafter referred to as the Water Supply Act) of an application for the right to divert water flowing past the appellant's property constituted sufficient notice under the Due Process Clause of the Federal Constitution (Jurisdictional Statement, p. 3; Motion to Dismiss, p. 2).

ARGUMENT

In view of the fact that the points which the applicants seek to argue are extraneous to the record, or relate to new issues not raised by the parties, or were adequately presented by the parties, the application for leave to file an *amicus curiae* brief should be denied.

(1)

As a first point the applicants seek leave to stress "the actual and deliberate manner in which the constructive service was made so as to attract the attention of as few interested parties as possible." Such argument, although extraneous to the record, was made by the appellant. Apparently the applicants merely want to stress or place different emphasis on the point. (Application for Leave to File *Amicus Curiae* Brief, pp. 2-3.) This is not a proper role for an *amicus curiae*.

The appellant's brief before the New York Court of Appeals admitted compliance with the notice provisions contained in the Water Supply Act. Such brief stated (p. 2):

> "In making the aforesaid application to acquire its title, the City complied with the notice provisions of the statute contained in § K41-8.0 which is set forth later herein."

And on page 6:

> "There is no contention in the complaint that the City has failed to comply with the requirements of Title K41. The sole and only contention upon which the plaintiff claims her right to an injunction, is that she received no notice and that the requirements of

> the Water Supply Act with regard to notice were inadequate and failed to comply with federal and state constitutional requirements of due process of law (fols. 49-50)."

And again (p. 48):

> "There is nothing in the complaint which suggested that the City has failed to comply with the requirements of the Water Supply Act. Neither the complaint nor the reply take issue with the fact that the Water Supply Act lays out certain requirements which were all followed by the City. Consequently, the first affirmative defense raises no issue in this case."

The Jurisdictional Statement (p. 3) admits "compliance with the letter of the statute" and the Appellant's Brief Opposing Motion to Dismiss (p. 15) admits compliance with the strict letter of the statute.

These admissions are binding on appellant (5 C.J.S., *Appeal & Error*, § 1344).

In spite of these admissions of compliance with the statute the appellant argued in the New York Court of Appeals and in Appellant's Brief Opposing Motion to Dismiss (pp. 4-7) that the manner of publication and posting in this case was not such as could be expected to give notice. In an effort to support such argument the appellant went outside of the record and charged that the appellee made a deliberate effort to hide the published notices and handbills (Appellant's Brief Opposing Motion to Dismiss, pp. 5, 6, 11, 21). This charge is, of course, not supported by the record and is emphatically denied.

The record shows that the notice was published in the City Record and in two newspapers published in the City of New York and in two newspapers published in Orange County; that the notice was published once each

week for at least six weeks immediately previous to the return date of the motion for permission to divert (R. 23-24); that the handbills were posted for the same period of time in twenty-two conspicuous places (R. 33-34, 36); that the handbills were posted in specified places in the vicinity of the real estate to be affected (R. 34-36); and that due and proper notice of the application was given as required by law (R. 51). The record does not set forth the particular newspapers, other than the City Record, in which the notice was published nor does the record state, or suggest, that there was any attempt, deliberate or otherwise, to publish or post the notice in any manner except such as would be calculated to come to the attention of the owners of properties to be affected.

Arguments that the notice was published and posted otherwise than as set forth in the record or in accordance with the statute, or that there was a deliberate attempt to publish and post the notice where it was not likely to be seen should not be considered even when presented by the appellant (See 5 C.J.S., *Appeal & Error*, §§ 1326, 1327).

Now the applicants seek permission to "stress" these same improper arguments.

Even if these arguments were supported by the record and properly made the applicants should not be permitted to file a brief as *amicus curiae* for the purpose of repeating and stressing them because the arguments have already been completely presented by the appellant.

(2)

The second point the applicants seek to argue is that the statute is defective because it does not require indexing in the County Clerk's office against the names of record owners of properties in which an interest or easement may be acquired.

This is a new question not presented to any of the courts below by either party. Therefore this point could not properly be urged by an *amicus curiae* (3 C.J.S., *Amicus Curiae*, §§ 3c, 3e(2), (8), (9aa)).

(3)

The third point the applicants seek to cover in their *amicus curiae* brief is "the effect of this statute upon the interests of mortgagees, infants, incompetents and absentee owners."

The record in the present case does not refer to the interests of mortgagees, infants, or incompetents and the parties did not raise any issues respecting such interests in any of the courts below nor on this appeal. Therefore, applicant's proposed third point with respect to such interest would not be the proper subject for the brief of an *amicus curiae*.

To the extent that the proposed point relates to the interests of absentee owners, the question has been adequately covered by the parties (Motion to Dismiss, pp. 2, 4, 7; Appellant's Brief Opposing Motion to Dismiss, pp. 1-3).

(4)

The applicants seek in a fourth point to argue that the Water Supply Act is defective because it allegedly fails to provide for the payment of awards to owners of rights to the uninterrupted flow of water past their properties.

This is a reference to Section K41-18.0 of the Water Supply Act which limits the time within which owners may apply for damages to three years and bars claims not filed within that time.

The appellant in the present case chose to challenge only the notice provisions contained in Section K41-8.0 of the statute (R. 15, 17; Jurisdictional Statement, pp. 2,

3, 12). The appellant not only admits but asserts that under Section K41-18.0 claims not filed within three years are barred (Jurisdictional Statement, p. 4). In other words her position was and is that the statute of limitation provision contained in Section K41-18.0 is constitutional provided adequate notice is given but she argues that the statute is unconstitutional because the notice provisions contained in Section K41-8.0 are allegedly constitutionally inadequate.

CONCLUSION

The application for leave to file a brief as *amicus curiae* should be denied.

April 12, 1962.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellee,
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New York 7, N. Y.

SEYMOUR B. QUEL,
THEODORE R. LEE,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 75.

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

BRIEF FOR GOLDSTEIN & GOLDSTEIN AS *AMICUS CURIAE.*

GOLDSTEIN & GOLDSTEIN,
Attorneys as Amicus Curiae,
274 Broadway,
Monticello, N. Y.

BENJAMIN M. GOLDSTEIN,
Of Counsel.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4151—1962

Index.

TABLE OF CASES AND STATUTES CITED:

	Page.
Title K 41-8.0 Administrative Code of City of New York	4, 5
In re Grand Boulevard and Concourse, 212 N. Y. 538, 544	6, 8
Walker vs. City of Hutchinson, Kansas, 352 U. S. 112 (1956)	6, 8, 9
Riehle vs. Board of Water Supply, City of New York, 15 A. D. (2) 931, 226 N. Y. S. (2) 295	8, 9
Title K 41-11.0 Administrative Code of City of New York	11
Application of Huie (Neilson), 6 A. D. (2) 837, 176 N. Y. S. (2) 193	11

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 75.

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF FOR GOLDSTEIN & GOLDSTEIN AS *AMICUS CURIAE.*

The undersigned had applied to this Court for permission to file a brief as *amicus curiae* on behalf of the following law firms:

Goldstein & Goldstein	274 Broadway, Monticello, New York
Cooke & Willis	236 Broadway, Monticello, New York
Newberg & Sakofsky	South Fallsburgh, New York
Harry C. Resnick	South Fallsburgh, New York
William F. Norton, Jr.	26 Broadway, New York 4, New York

This Court granted such permission on April 30, 1962.

Each of the above named law firms represent clients who are owners of riparian properties along the Neversink River downstream from the Neversink Dam, several of whom are upland owners of rights of way in their deeds across riparian properties and to the use of the Neversink River for various purposes including mainly fishing, bathing and boating. These property owners did not file their respective claims for compensation within the three-year statute of limitations for the rea-

son that these owners did not know of the taking of a portion of their property by the appellee until after the appellee claimed that the statute of limitations had expired.

The said attorneys represent approximately 70 different claimants who have been barred from the hearing of their claims and compensation to this time, although there are other claimants represented by other counsel who are not mentioned above.

There were many glaring defects in the so-called notice that had been posted and published by the appellee, some of which will be called to the Court's attention in this brief.

1. The appellee having made a motion to dismiss the complaint for insufficiency, the facts therein must for the purposes of this motion be presumed to be true, so deemed, appellant herein did not learn or know that the City of New York had acquired an interest in her property and that she had a right to file a claim (fol. 14, p. 13 of the transcript of record). Likewise deemed true is that she never had been notified in any manner that the City sought to acquire the right to divert the Neversink River (fol. 14), or that she had any knowledge, either constructive, actual or implied, of such proceedings prior to retention of counsel (fol. 15).

2. We submit that the proceedings before the Board of Estimate and Apportionment in 1927 and 1928 and the modification of the map and profile of 1938 (fols. 20-22) were similarly without proper notice to the persons most affected by the City's plan. It, at least, gives impetus to the claim of the appellant and all others similarly situated, particularly since the City let the matter lie dormant until 1952 when it suddenly and without any further notice, except by posting and publication, activated these proceedings by designating five

sections to cover forty miles of territory or eighty miles of river-front property. As to these eighty miles of river-front property affected by the taking, the City had placed approximately one hundred posters in the winter-time where and when few people could see them. We submit such notice was improper to give notice to the appellant or any other riparian owner of the taking for the following reasons:

(A) The so-called notice which had been posted on January 22, 1952, bears date January 10, 1952, and had been made returnable at the Dutchess County Court House in the City of Poughkeepsie, New York, on March 14, 1952. This notice, aside from the title, reads as follows:

> "PLEASE TAKE NOTICE that it is the intention of the Corporation Counsel of the City of New York pursuant to the provisions of Title K of the Administrative Code of the City of New York to make application to the Supreme Court of the State of New York at a Special Term thereof to be held at the Dutchess County Court House, in the City of Poughkeepsie, County of Dutchess, New York, in the Ninth Judicial District, on the 14th day of March, 1952, at the opening of Court on that day, or as soon thereafter as counsel can be heard thereon, for the appointment of three Commissioners of Appraisal to ascertain and determine the compensation to be made to the owners and all persons interested in certain real estate affected for the purposes indicated in said Title K of the Administrative Code of the City of New York as shown upon a certain map entitled:
>
> 'Neversink Riparian Section No. 4—Board of Water Supply of the City of New York, map of Real Estate Situated along the Neversink from the vicinity of Cuddebackville to the vicinity of Huguenot, in the Town of Deerpark, County of Orange, State of New York.'

adopted by the Board of Estimate November 15, 1951, and filed in the office of the County Clerk of Orange County on December 5, 1951, as Parcels Nos. 219 through 306 and 423 through 430, both inclusive.

The petitioner by this proceeding seeks to become vested with the right and easement in perpetuity in and against all of the parcels of real estate above described and shown on the aforesaid map to divert all or any part of the waters of the Neversink River and its tributary watershed originating above the Neversink Dam DESCRIBED IN THE PETITION HEREIN, either continuously or from time to time, and in such quantities as the operating needs of the City of New York as determined by it, may require together with the right from time to time to release and discharge into Neversink River below the Neversink Dam waters impounded in the Neversink Reservoir (fols. 30-32).

Dated: January 10, 1952." (Emphasis ours.)

The petition had been dated and verified on February 15, 1952 (fols. 48 and 49, pp. 33 and 34 of the transcript of record). The notice dated January 10, 1952, which had been posted and published by the appellee had pre-dated the petition by one month and five days and had therefore been predicated upon a petition which had not been in existence at the time of the posting and publication thereof. It certainly was not in existence for six weeks prior to the hearing on March 14, 1952, as required by Title K, Section 41-8.0 of the Water Supply Act. Where could any person see or examine the premises "which the petitioner (appellee) by this proceeding seeks to become vested with the right and easement in perpetuity in and against all of the parcels of real estate * * * described in the petition herein * * *" when there was no petition in being at the time.

A notice such as this predicated upon a petition without a petition was a nullity and therefore this appellant and all other riparian claimants had been deprived of their property without due process of law, particularly where, as here, no personal notice was given to them and the petition was not in existence for six weeks following posting and publication as required by Section K 41-8.0 of the Water Supply Act.

(B) Here, we submit, that the entire proceedings were also defective. The proceedings had been entitled, New York Supreme Court; Ninth Judicial District. There were and still are five counties within the State of New York comprising the Ninth Judicial District. The City would have required the appellant herein and all other riparian claimants to ferret out the particular county where the proceedings had been pending to see in which county the petition, the notice and the other necessary papers had been filed. Had the appellant or any other riparian claimant or their respective attorneys gone to each of the five counties which had comprised the Ninth Judicial District, they would not have found either the petition, the notice or other papers on file with reference to this taking by the appellee, for none of these papers had been filed in any County Clerk's Office until May 29, 1952 (a period of two and one-half months after the hearing had been had in the Dutchess County Clerk's Office, and four months and nineteen days after the date of the notice) (fol. 25, paragraph XLIV of plaintiff's complaint, p. 17). To sustain the appellee's position would require the appellant to check the public records practically daily to ascertain if, when and where the appellee had filed its petition for otherwise she would not have known thereof. We submit that such is not the requirements of the Law of Condemnation.

In 1914 Judge Cardozo, later a Judge of this court, in the case of *In re Grand Boulevard and Concourse*, 212 N. Y. 538, 544, involving the City of New York, stated in part:

> "Before the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the state. He cannot be charged with the duty of hunting out the facts for himself. The state is appropriating his property by proceedings *in invitum*, and it cannot shift upon him the burden of ascertaining that the proceedings are in motion. It must give him notice reasonably adopted to bring their pendency to his attention."

We submit that for a proceeding that was originally instituted by the appellee in 1927 for a taking which was not to take place until the year 1952, where the petition herein, the notice, the papers, and the order of appointment of appraisers had not been filed in any County Clerk's Office until May 29, 1952, and where no copies of the papers or order of the appointment of appraisers or of the notice of any hearing, or of the time and/or place of the sitting of the commissioners of appraisal had been given or served upon appellant so that a claim may be presented to them as such commissioners by the appellant, did not bring home to the appellant and others similarly situated, the notice reasonably calculated of the pendency of these proceedings.

(C) The statute (Water Supply Act) is defective on its face for failure to provide any form of personal notice. On almost similar facts this Court in *Walker vs. City of Hutchinson, Kansas*, 352 U. S. 112 (1956), said amongst other things:

> "The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the

quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases.

"It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

"Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.

* * * * * * *

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. Notice by publication in too many instances is not notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use."

In the light of the *Mullane* and *Walker* cases, it seems clear that the statute was defective and deprived this appellant of her property without due process of law.

(D) The appellant had been deprived of her property without due process of law and without just compensation. No award had been made or compensation paid to the appellant or to others similarly situated.

It seems to us that a greater requirement is necessary as to notice complying with constitutional requirements of due process where no award has been given or made than where an award had been actually made. In fact, no method of appraisal has been set forth and an award permitted if there has been no appearance in the proceeding and the claim presented. Therefore, it seems to us that the appellee had a greater constitutional burden of searching out the various owners to give them proper notice of the proceeding.

Under this statute (Water Supply Act) unless there has been a claim filed, no method of appraisal or award is available as the statute had been construed by the lower courts.

> See *Richle vs. Board of Water Supply, City of New York*, 15 A. D. 2d 931, 226 N. Y. S. 2d 295.

Point "I" in *Richle vs. Board of Water Supply, supra*, raised that point properly and this contention had been

overruled by the Appellate Division, Second Department, after the decision in this case by the Court of Appeals of the State of New York.

In the *Walker* case, an award had been made and actually given but the claimant had not been satisfied with the amount of the award and this Court held that even though an award had been made it was not proper and had reversed the lower court.

The dissenting opinion of Mr. Justice Frankfurter in the *Walker* case likewise bears out our contention. There Mr. Justice Frankfurter stated:

> "Once appellant discovered that his land had been condemned and that the time for appeal from the award of the commissioners had passed, various possible courses of action, followed separately or in combination and each raising different issues, were open to him. If he considered the award fair but still desired to keep his land, he could have contended that unconstitutionality of the notice for the hearing on compensation invalidated the taking. If he considered the award unfair, he could have alleged in an appropriate action the unconstitutionality of the notice of the compensation hearing and the inadequacy of the compensation and sought to obtain fair compensation, see *Ward v. Love County*, 253 U. S. 17, or to restrain entry onto his land until he received a hearing under Kan. Gen. Stat., 1949, Sections 26-202, or, making a further allegation of the invalidity of the taking, to obtain a permanent injunction. At this stage, it is not relevant for me to imply any opinion on the merits of any of these possible courses of action.
>
> "On a fair reading of the complaint, appellant chose to pursue only the first course. The theory of this action, an attempt to restrain the city from trespassing on his land, is that he still has the right of possession. His petition for injunction based this right to possession solely on the allegation

that the statutory notice was insufficient. Nowhere in his petition for an injunction does appellant make any factual allegation that the money deposited by the commissioners did not represent the fair value of his land and therefore did not leave him out of pocket. Nowhere did he indicate that he wanted an injunction only until he received a hearing. The whole theory of his petition is that the property that was being taken without due process of law was his land not its money value.

* * * * * * * *

"In my view, the only constitutional question raised by appellant is whether failure to give adequate notice of the hearing on compensation of itself invalidates the taking of his land, apart from any claim of loss. * * *

"Appellant must be able to show that the provisions for payment as they operated in his case were inadequate before he can attack the Kansas statutory scheme for compensation in condemnation cases. See *Ashwander vs. T. V. A.*, 297 U. S. 288, 347 and cases cited n. 6 (Brandeis, J., concurring) cf. *Smith v. Indiana*, 191 U. S. 138, 148-149. Since on the record before us the compensation was not alleged to be inadequate, the taking was valid and the judgment of the Kansas Supreme Court should be affirmed. * * *

"Without intimating any opinion whether in the circumstances of this case appellant was denied the due process required in determining fair compensation for property taken under the power of eminent domain, I feel constrained to point out that the Court's decision does not hold the taking itself invalid and therefore does not require the Kansas court to grant an injunction so long as appellant's rights are protected."

We submit as to each mapped parcel, the Commissioners of Appraisal should be required to make an award.

The Constitution requires; in the taking of private property, that there be adequate notice to comply with due process, and also just compensation.

This Water Supply Act, consequently, aside from the question of notice, is also repugnant to the Constitution in that it permits the taking of private property without compensation of any kind if the claim is not timely filed.

There is no reason that the Commissioners could not have made an award to Miss Schroeder even though no claim was filed. Her property was shown on the taking map, and her name listed thereon (see map, Exhibit "A" in exhibit file).

The Statute in Question Should Not be Preserved for Its Many Defects.

The Court will note, for example, that the appellee has paid no attention in this proceeding to up-land owners having rights of way in their deeds to the beneficial use of the river. This is so despite the fact that the appellee's deed studies would reveal these easements to which various numbered parcels are servient. These up-land parcels were not mapped, numbered, nor were the names of the owners mentioned in any proceedings. Yet, these property owners, who were completely ignored in this proceeding, have been subjected to the short statute of limitations despite the fact that the Water Supply Act provides that title shall only vest in the City upon those parcels which are shown on the map (see Title K 41-11.0 of the Water Supply Act; see also *Application of Hale [Neilson]*, 6 A. D. 2d 837, 176 N. Y. S. 2d 193).

Furthermore, there is no provision anywhere in the Water Supply Act for indexing the rights acquired by

appellee in any County Clerk's Office as against any property owner. Consequently, a title search against property sold after title has vested in the City fails to reveal the interests in said property acquired by appellee. This, then, leads to the situation where there is a contest as to which title is paramount, that acquired by the bona fide purchaser for value and without notice on the one hand, or the appellee on the other.

There is no notice of any kind that can conceivably be had by a mortgagee of riparian property. Also, should there not be some protection to guard the rights of infants and incompetents to proprietary interests in the property being taken? This wholly inadequate statute makes no provision whatever to guard such rights or to protect those who, under the law, are incapable of protecting themselves.

The writer of this brief and the law firms represented, without repeating the arguments in the brief of appellant, join wholeheartedly in her claim that the conduct of the appellee in the taking of property under this statute was unconscionable and with the deliberate attempt to obtain private property without paying for it. A municipality should certainly be held to a higher standard of conduct particularly where it is taking property *in invitum*.

For these reasons we submit that the order and judgment appealed from should be reviewed and reversed by this Honorable Court and the case remanded to the State Court so that just and fair compensation can be paid to this appellant and others similarly situated.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 1961

No. 703

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, INC., AS *AMICUS CURIAE*

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Supreme Court of the United States

OCTOBER TERM 1961

No. 763

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

BRIEF FOR NEW YORK CIVIL LIBERTIES UNION, INC., AS *AMICUS CURIAE*

The New York Civil Liberties Union is an affiliate of the American Civil Liberties Union, a national non-profit organization devoted to the implementation of the rights guaranteed by the United States Constitution. Although it is concerned mostly with deprivation of personal rights it is also concerned with possible interference with property rights. It believes this to be such a case because of the inadequacy of the notice provided by the applicable statute. This brief is being filed with the consent of both parties.

Under Title K41 of the Administrative Code of the City of New York, the City instituted a proceeding to acquire the right to divert water of the Neversink River (fols. 34, 35). Notice of this proceeding was given by publication and posting only (fol. 37). The notices contained no reference to appellant or her property (fol. 38) other than a general reference to property along the river between certain points (see fols. 91, 92). The text of the published and posted notices appears in the record as Exhibit B (pp. 30-32). That merely called attention to an application for the appointment of Commissioners of Appraisal. It contained no indication that action was

required of any land owner. The statute provides machinery for the determination of claims but makes no provision for any valuations or payments in the case of non-claimants. It requires claims to be presented within three years after taking of title.

Appellant; being in ignorance of the pendency of the proceedings (fol. 40), filed no claim within the three year period (fol. 86). After the expiration of that period she brought suit to enjoin diversion of waters from her property (fol. 51).

Appellee's motion to dismiss the complaint on the ground that relief was barred by limitations (fols. 24, 25) was granted at Special Term (pp. 58, 59). The sole issue considered was the challenge to the sufficiency of the notice on constitutional grounds. That determination was upheld both by the Appellate Division of the New York Supreme Court and by a divided Court of Appeals.

The majority opinion of the latter Court (10 N. Y. 2d 522), after citing the cases in this Court relied on by appellant (*Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306, and *Walker* v. *Hutchinson City*, 352 U. S. 112), rested its conclusion on its belief that the challenged diversion was "clearly apparent" before the expiration of the time within which claims might be filed. Two of the Judges dissented, pointing out that the publication had been made in rural communities far from the subject property and that the posting and publication had occurred in January, although it was known that much of the property affected was then vacant. It is significant, moreover, that, as pointed out by appellant in her jurisdictional statement, there is nothing in the record to support the statement of the majority that there had been any "clearly apparent" effect of the diversion within the time specified for the filing of claims. No such contention was made by the City in its answer.

Moreover, even if some change in the river had been apparent, a person in the position of appellant, a vaca-

tionist in the area, would not normally associate it with a diversion by the City but might more readily have attributed it to some natural cause, perhaps a temporary one.

In our view, however, the disposition of the case should not turn on any issue of the extent to which the diversion might have been noticeable at any given time or place. Property rights should not depend on such fleeting factors. Essentially, where a municipality seeks to condemn property and knows the names of the owners it should be required, at the very least, to mail written notice of the proposed legal proceedings to those owners. Such was the holding in *Mullane*. The attempted distinction by the New York Court of Appeals that here we are dealing with "the tangible and the visible" can lead only to confusion and injustice.

Let us suppose that the subject of this condemnation had been standing timber taken in the middle of winter, rather than merely water diversion. How was the property owner to know that this had been taken under a condemnation proceeding instituted by the City and not by some trespasser in the owner's absence, unless given notice by the City of what it was doing?

The rule enunciated in *Mullane*, requiring at least mail notice (339 U. S. at 319), can constitute no hardship to any condemning body. It should be the minimum consonant with due process in every case.

We, therefore, join appellant in urging reversal of the determination of the New York Court of Appeals.

Respectfully submitted,

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SUPREME COURT, U. S.

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1962.

No. 75.

MADELINE C. SCHROEDER,
Appellant,

v.

THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLANT.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4181—1963

Index.

	Page
Opinions Below	1
Jurisdiction	1
The Statute Involved	2
The Question Presented	3
Statement of the Case	4
Digest of Pleadings	7
The Complaint	7
The Answer	9
The Reply	10
The Motion in Question	10
Summary of Argument	11
Argument:	
POINT I. The notice provisions of Title K41-8.0 of the Administrative Code of the City of New York rely entirely on publication of notice to acquire private property, and contain no requirement for any form of personal notice. The statute is consequently inherently short of due process	13
POINT II. The learned New York Court of Appeals, in its majority opinion erred in applying the facts and stating the law in several important respects	23

Page

Point III. The appellee deliberately took advantage of this defective statute to acquire property without compensation 37

Conclusion 40

Appendix 43

TABLE OF CASES:

Armour Fertilizer Works, 237 U. S. 413 34

Berryhill v. Sepp, 106 Minn. 458 33

Central of Georgia Ry. Co. v. Wright, 207 U. S. 127, 138 33

City of New York v. N. Y., N. H. & H. Ry. Co., 344 U. S. 293 (1953) 13, 19, 20

Coe v. Armour Fertilizer Works, 237 U. S. 413, 424, 425 34

Gillespie v. Fort Dodge, D., M. & S. Ry. Co., 203 F. 2d 119 19

Gordon v. N. Y. Institute of Optics (1950), 277 App. Div. 1100, 101 N. Y. S. 2d 192 27

Grannis v. Ordean, 234 U. S. 385 16

Hess v. Pawloski, 274 U. S. 352 32

Landefeld v. Seibert (1959), 8 A. D. 2d 973, 190 N. Y. S. 2d 832 27

Page

Louisville and Nashville R. R. Co., v. Stock Yards Company, 212 U. S. 132, 144 33

Matter of Huie (Nielsen), 6 A. D. 2d 837, 176 N. Y. S. 2d 193 ..... 30, 38

Matter of Huie (Riehle), 6 A. D. 2d 838, 176 N. Y. S. 2d 197 30

Milliken v. Meyer, 311 U. S. 457 16

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 656 ..... 13, 15, 19

Priest v. Board of Trustees of Las Vegas, 232 U. S. 604 16

Roller v. Holly, 176 U. S. 398, 409 ..... 16, 33

Security Trust Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87 33

Stuart v. Palmer, 74 N. Y. 183, 188 33

Walker v. City of Hutchinson, Kansas, 352 U. S. 112 (1956) 13, 19

Wisconsin Electric Power Co. v. Milwaukee, 352 U. S. 948 ..... 13, 20

Wuchter v. Pizzuti (1928), 276 U. S. 13 ..... 32, 33, 35, 36

Page

STATUTES MENTIONED:

Title K41-11.0. Administrative Code of City of New York 43

Title K41-18.0. Administrative Code of City of New York 43

New York Civil Practice Act, Section 476 ..... 27, 44

New York Rules of Civil Practice, Rule 112 ..... 27, 44

New York Rules of Civil Practice, Rule 109 (6) 27, 44

Section 11.20. Milwaukee City Charter 21

Section 66.60. Milwaukee City Charter 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 75.

MADELINE C. SCHROEDER,

Appellant.

v.

THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Opinions Below.

The opinion of the court of original jurisdiction, Supreme Court, Special Term, Albany County, dated April 22, 1960 (R. 38-39) was not reported.

The opinion of the Appellate Division, dated August 1, 1961 (R. 43-45), was reported at 14 A. D. 2d 183, 217 N. Y. S. 2d 975.

The majority and minority opinions of the New York Court of Appeals dated January 25, 1962 (R. 46-52), were reported at 10 N. Y. 2d 522, 225 N. Y. S. 2d 210.

Jurisdiction.

The Court of Appeals held that the statute in question does not contravene the requirements of the due process clause of the 14th Amendment to the United States Constitution.

The jurisdiction of this Court was invoked under 28 U. S. Code, §1257 (2).

The notice of appeal to this Court from the order and judgment of the Court below was filed on February 13, 1962 (R. 57). The records from the New York Court of Appeals and the requisite Jurisdictional Statement were filed. Appellee moved to dismiss, and this Court noted probable jurisdiction by order dated April 30, 1962 (R. 59), reported at 82 S. Ct. 1029.

The Statute Involved.

Administrative Code of the City of New York, Title K41-8.0. NOTICE OF APPLICATION FOR APPOINTMENT OF COMMISSIONERS OF APPRAISAL.—The corporation counsel shall give notice in the city record, and in two public newspapers published in the City of New York and in two public newspapers published in each other county in which any real estate laid out on such maps may be located, and which it is proposed to acquire in the proceeding; of his intention to make application to such court for the appointment of commissioners of appraisal which notice shall specify the time and place of such application, shall briefly state the object of the applications and shall describe the real estate sought to be taken or affected. A statement of the real estate to be acquired or affected for the purpose of carrying out the said plan or plans or in any part thereof with separate enumerations of the numbers of the parcels to be taken in fee, and of the numbers of the parcels in which an easement is to be acquired, together with the route of the tunnels and aqueducts by courses and distances and of the greatest and least width of its required easement or parcel of land with a reference to the dates and places of filing such maps, shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be so published, once in each week, in each

of such newspapers for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected. After the original appointment of commissioners of appraisal pursuant to the provisions of this article, the corporation counsel may apply at a Special Term of the Supreme Court in the same judicial district where application for such original commission was made for the appointment of a successor commission, upon first giving ten days' notice by advertisement in the newspapers herein above described of his intention to make such application.

(See New York City Charter and Administrative Code, Annotated, Vol. 5, pp. 558-559, 1957 ed., Williams Press, Inc.)

The Question Presented.

Is Title K41-8.0 of the Administrative Code of the City of New York unconstitutional on its face, and as applied in this case, in that it provides in a condemnation proceeding for notice which is entirely constructive, and fails to provide even minimum standards for such notice, despite the fact that the addresses of property owners whose properties are being taken are known, thereby taking from appellant in this case her real property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

This is an appeal from an order and judgment of affirmance of the Court of Appeals of New York. The said order and judgment affirmed an order and judgment of

the Appellate Division of the New York Supreme Court which, in turn, had affirmed an order and judgment of Special Term of the said Court.

This is an action for an injunction brought by the plaintiff-appellant, who is the owner of a parcel of land and summer home riparian to the Neversink River, to enjoin the defendant from diverting the said river upstream from the plaintiff's property.

The basis of the complaint is that the appellee, in a condemnation proceeding, failed to acquire title, i. e., the right to divert the stream as against this appellant, this contention resting upon the appellant's claim that the notice provisions of the statute of condemnation in question were inadequate and far short of the due process requirements of the Federal and State Constitutions.

Appellant is one of a great number of property owners along the Neversink River who failed to file their claims for compensation within the three-year limitation of time simply because during said period, and until the institution of this suit, she had no notice of any kind and was completely ignorant of the acquisition by appellee of an interest in her property.

The appellee, in 1952, had brought a proceeding under Title K41 of the Administrative Code of the City of New York to acquire the right to divert the waters of the Neversink River at what is now the Neversink Dam in Sullivan County. In said proceeding an order was made at Special Term, dated March 14, 1952, granting to the City such right, and appointing commissioners of appraisal. The commissioners so appointed filed their oaths of office on June 9, 1952, the said date being the date of the taking (R. 8, 18).

It can be seen that the notice provided in the statute is entirely and purely constructive, that no form of personal or actual notice is required, nor was any in this case given.

The statute, in §18.0 (a) thereof (App. p. 42), provides a three-year limitation of time in which property owners may file claims, after which their claims are barred, in which event they may not receive any compensation whatever for the property taken from them.

This statute of limitations commenced to run on June 9, 1952, the date of the filing of the oaths of the commissioners, which is the date the City purported to acquire its title (Title K41-11.0 and 18.0, *set forth in the Appendix hereto*).

The City, however, did not commence to actually divert the river until on or about June 1, 1953 (R. 9).

The plaintiff was not at any time notified of the City's application, served with a summons, nor given any other personal notice of said proceeding (R. 9) and plaintiff had no knowledge of said proceeding, either constructive, actual or implied, prior to her retention of counsel in this action (R. 10).

The City still diverts the river, causing the plaintiff serious damage and decreasing the market value of her property (R. 9, 10).

Consequently this action in equity for an injunction was brought raising the question of title and placing the constitutionality of the notice provisions (Section 8.0 of Title K41) squarely in issue.

The notice given by appellee, in compliance with the letter of the statute, consisted of: Publication once a week for six weeks in the city record and two newspapers published in New York City, and two newspapers

published in Orange County where this property is located, the newspapers having been obviously deliberately selected to be those published many miles from the property affected, despite the availability of newspapers published in the vicinity of the properties; the posting of 22 notices, 19 on trees and 3 on poles, on both sides of the Neversink River along a 7 or 8 mile stretch thereof; the notice making no mention of any of the names of the persons affected, although each was known to appellee; the notice merely announcing the appellee's intention to apply on the return date for an order acquiring the right to divert and for the appointment of Commissioners; the notice containing no indication that action was required of any property owner; and the notice, dated January 10, 1952, having been published in January, calling for a March 14, 1952, return date, despite the fact that the great majority of the properties were known to be summer-occupied only.

As appellant had no notice or knowledge of this proceeding, she did not appear.

It might be pointed out that this is one of a great many cases presently pending in the various New York Courts and that the instant case is, so to speak, a "test case" on the question of the constitutionality of the said statute.

Should the appellant prevail in this action, the appellee would then be compelled to give proper notice and the appellant would have the opportunity to present her claim for determination to commissioners of appraisal.

Should the City prevail, the appellant and many others will have been deprived of their property without compensation of any kind.

Digest of Pleadings.

The Complaint (Rec. 7-12).

The complaint herein alleges the title of plaintiff from March, 1950, to the present (R. 7), describing said lands as consisting of approximately 3.5 acres of land with about 175 feet of frontage along the center of the Neversink River, upon which lands there is a dwelling (R. 7). It alleges further that the City commenced a proceeding prior to March 14, 1952, to acquire the right to divert the river upstream from the plaintiff's property and that subsequently an order was made at Special Term granting the City this right (R. 7). The complaint describes the fact that said proceeding taken by the defendant was under Title K41 of the Administrative Code of the City of New York, that maps were filed pursuant thereto designating plaintiff by name and her property as Parcel 424, Neversink Riparian Section #4 (R. 8); and that the said statute required notice by publication only (R. 8).

The complaint further states that plaintiff had no personal notice or knowledge of the taking, that she read none of the notices published (R. 9). The complaint then goes on to allege damage by the continuing trespass of the City (R. 9), without an adequate remedy at law and asks for an injunction (R. 11).

We deem the following paragraph of the complaint, *which is admitted by the City*, to be of important factual background for the determination of the constitutional question raised by the complaint (R. 10).

> "24. That in the said proceeding the defendant laid out five sections of the Neversink River from the site of the Neversink Dam to the confluence of the said river with the Delaware River into which the Neversink flows, numbering said sections 1 through 5 inclusive.

"That the amount of numbered parcels on the city's maps, and the number of mapped parcels designated which failed to file claims prior to the expiration of the Statute of Limitations are as follows:

Section Number	Number of Mapped Parcels	No. of Mapped Parcels Not Filing in Time
1	85	13
2	83	23
3	76	43
4	96	78
5	82	67
	431	224"

We ask the Court to disregard the arithmetical error in addition in the middle column where the total number of mapped parcels apparently should have been 422 instead of 431. (The difference involves some utility parcels not included.)

The complaint further points out in paragraph 26 that in addition to the numbered parcels there are upland parcels which are unnumbered also having rights to the river and that (par. 27) such upland parcels were not numbered by the City and are consequently not included in the mapping, and that (par. 28) there are a substantial number of these rights-of-way claims which likewise have not been filed in time (R. 11). Paragraphs 26, 27 and 28 *are also admitted* in appellee's answer.

The sole and only contention upon which the plaintiff claims her right to an injunction, is that she received no notice, and that the requirements of the Water Supply Act with regard to notice were inadequate and failed to comply with the Federal and State Constitutional requirements of due process of law (R. 11).

The Answer (Rec. 12-37).

The answer contains a series of formal denials of information and belief, admitting the allegations of no personal notice (par. VIII, R. 13) and denying outright only those allegations in paragraphs in the complaint alleging basically conclusions.

The prior proceedings under Title K41 are admitted.

Also, the figures with respect to the number of parcels and the number of unfiled claims *are admitted (supra)*, and the fact that, in addition to the said number of numbered parcels there are also unnumbered rights-of-way parcels, a substantial number of which failed to file claims in time, is also *admitted*.

The answer also contains three affirmative defenses. The first affirmative defense outlines all of the proceedings taken by the City of New York under Title K41, alleging compliance with the statute and the consequent acquisitions of title (the right to divert). It then concludes with an allegation that the action and any claim on behalf of the plaintiff is barred by the statute of limitations, Section K41-18.0 of the Administrative Code of the City of New York (R. 19, 20).

The second affirmative defense is that since the plaintiff failed to present a claim to the Comptroller of the City of New York for adjustment and a notice of intention to commence this action under Section 394a-1.0 of the Administrative Code and Section 50-e of the General Municipal Law that the action is barred (R. 20).

The third affirmative defense is to the effect that this action is barred by laches, in that the plaintiff failed to present a claim in time to commissioners of appraisal, in failing to serve a claim upon the City of New York, and

in failing to make demand upon the Comptroller of the City of New York before the commencement of this action, and in delaying the commencement of this action (R. 20).

The Reply (Rec. 37-38).

The reply admits the factual statements of the first affirmative defense but denies the legal conclusions thereof and denies the allegations of the second and third affirmative defenses (R. 37-38).

The Motion in Question.

The defendant moved, pursuant to Civil Practice Act, Section 476, and Rule 112 of the Rules of Civil Practice, for judgment on the pleadings and for a dismissal of the complaint.

Plaintiff cross-moved under Section 476 of the Civil Practice Act and Rule 109 (6) of the Rules of Civil Practice to dismiss all affirmative defenses, and under Section 476 and Rule 112 for judgment on the pleadings.

Special Term, by memorandum decision (R. 38-39), held that the notice provisions of Section K41-80 of the Water Supply Act were not violative of the due process provisions of the Federal and State Constitutions and accordingly granted the appellee's motion to dismiss the complaint, and denied the cross-motion. A judgment and order were entered thereon and an appeal taken to the Appellate Division, Third Department.

The Appellate Division held that "the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a 3-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions" and affirmed (R. 43-45).

The New York Court of Appeals, by a 4-2 decision affirmed (R. 46-52).

The majority of the Court below relied upon the posting of handbills and the supposed visible effect of the diversion as providing such notice as would comply with due process, even though the statute provided no standards for the posting of handbills, nor did the pleadings even mention there being any so-called "apparent effect" of the diversion.

The minority of the said Court, Judge Dye writing the opinion in which Judge Van Voorhis concurred (R. 48-52), held that the publication of notices in distant newspapers having no circulation in the area of the properties taken, despite the availability of newspapers in nearby communities, together with the posting of handbills in remote places at a time when it was known that the properties would be vacant, failed to provide any reasonable notice; and that the statute in question was inherently defective in making no provision for personal service, nor any adequate substitute, even though personal service could have easily been made.

All the New York courts evidently disregarded the affirmative defenses as being insufficient in law, and reached and dealt with the constitutional question alone. Had the statute been held unconstitutional, the answer would have been dismissed on the cross-motion as per the opinion of Judges Dye and VanVoorhis.

Summary of Argument.

Appellant contends that the notice provisions of the statute in question fail to comply with the minimum requirements of due process of law. She rests this contention upon the undisputed fact that the statute providing

for notice to be given to property owners in the taking of their property in a condemnation proceeding provides for notice by publication alone, despite the fact that the names and addresses of the property owners are at hand.

The appellant further contends that this determination should rest upon the language of the statute itself, and that in making its determination the Court should not consider the possibility of there having been some form of other notice not provided in the statute that may have been fortuitously had.

It is also the position of the appellant that this record contains no indication that this appellant had any knowledge of any kind of the taking of her property within the limitation of time to file her claim, and that the Court should not go beyond the record and to assume that she was aware of the taking, which she strongly denies.

In presenting these arguments, the appellant shows to the Court the great injustices caused by the operation of this statute in its failure to provide notice.

If the statute falls short of due process and is repugnant to the Constitution, the appellee has failed to acquire its title. In such event, there would be a reversal of the order and judgment of the New York Court of Appeals, and, upon remand of the case, the New York courts would make provision for the payment to appellant of such compensation to which she is entitled under the applicable provisions of law.

ARGUMENT.

POINT I.

The notice provisions of Title K41-8.0 of the Administrative Code of the City of New York rely entirely on publication of notice to acquire private property, and contain no requirement for any form of personal notice. The statute is consequently inherently short of due process.

This United States Supreme Court has laid down a clear and unequivocal rule respecting the minimum requirements of notice in order for the same to comply with the constitutional requirement of due process.

We respectfully submit that this rule provides that due process of law requires, in the taking of private property, some form of personal notice, at least a letter, and that the absence of personal notice in a given situation can only be dispensed with where there is a compelling reason shown as to why it could not, in the particular given case, be had. We respectfully submit that the judgment of this Court in establishing such a rule is based upon the knowledge and practical experience that notice by publication is too often no notice at all, and that under the ordinary principles of fair play, some form of personal notice should be required, at the very least, a letter.

This principle was stated and re-affirmed over again in the *Mullane*, *Gillespie*, *City of New York*, *Walker* and *Wisconsin Electric Power Co.* cases to be cited hereafter.

Consequently a statute, particularly a condemnation statute involving the taking of known properties from known owners, which makes no provision whatever and is barren of any requirement for any form of personal notice is therefore inherently constitutionally defective.

The statute in question here relies entirely upon newspaper publication and a scattering of a few handbills over a great area to provide notice to property owners. The handbills cannot be considered a form of personal notice, as there are no specifications or even minimum standards for same, and they are not required for each property. Consequently, the handbills are merely another form of publication.

The handbills were not required to, and did not, contain the names of any of the persons affected, did not contain any reference to action that was required to be taken by property owners, nor did they indicate in the slightest that action was required of the property owners in order to ensure compensation.

Were a handbill to be posted on a conspicuous place on each individual parcel affected, such as a dwelling, appellee might argue that the same is substituted service. However, such is not the case here and, at best, the handbills were merely another form of publication.

The statute is consequently inherently defective.

It will be shown in this brief how the City of New York deliberately and conscientiously set about to acquire property without compensation. It will be shown how the appellee, working under this inadequate statute, deliberately hid the notices and tried as best they were able, to keep the taking of properties a secret from the property owners affected. After having succeeded to a considerable extent in so doing, the short statute of limitations for filing of claims was applied and the City took the position that no compensation whatever would be paid to those property owners who failed to file claims in time. We know that what has happened here will shock the sense of justice of this Court.

Yet, this unconscionable conduct on the part of the appellee municipality under this statute could only take place under a statute which permits it, and is merely indicative of the inadequacy of the statute.

In other words, the facts concerning the injustices resulting from this inadequate statute are highly illustrative of the consequences that can be had with a statute that fails to provide adequate notice.

It is our position here that even if these injustices had never resulted, that even if the City of New York had made an honest effort to publish in newspapers having circulation in the area of the taking, even if appellee had posted handbills on each property and in public places in the vicinity of the taking, that nevertheless, the statute would be unconstitutional for the reason that inherently, and by its own language, it falls far short of the minimum requirements of due process under the established case law.

We respectfully cite the case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 70 S. Ct. 652, 656, decided April 24, 1950. In this case the Supreme Court held unconstitutional a section of the Banking Law of the State of New York which permitted service by publication of a citation in a Surrogate Court proceeding, for the settlement of the accounts of a common trustee, where the identity of place of residence of the class of beneficiaries to be so served was known to the accounting trustee. Certain excerpts from that decision are of important significance:

> "(4) Quite difference from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they

require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

"(5) In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interest. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

• • • • • • •

"(7) • • • 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U. S. 385, 34 S. Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. • • •

"(8) An elementary and fundamental requirement of due process if any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357; *Grannis v. Ordean*, 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604, 34 S. Ct. 43, 58 L. Ed. 751; *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 4410, 44 L. Ed. 520. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable

time for those interested to make their appearance, *Roller v. Holly, supra,* and *cf. Goodrich v. Ferris,* 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914. • • •

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. • • •

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through *local* newspapers. Chance alone brings to the attention of even a *local resident* an advertisement in small type inserted in the back pages of a newspaper and *if he makes his home outside the area of the newspaper's normal circulation* the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required *does not even name those whose attention it is supposed to attract,* and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

• • • • • • •

"(12) *As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.*" (Italics added.)

Attention is called to the reference by the Court to the case where the notice "does not even name those whose attention it is supposed to attract," which is our case here. (See Notice, R. 21-22.)

Note also the reference to the situation where the person affected "makes his home outside the area of the newspaper's normal circulation," which is the situation here too, the newspaper publication in this case being at a different end of the county, and which will be discussed later in this brief.

This *Mullane* case established the rule that where names and addresses of interested parties were known, due process required more than notice by publication, at least the mailing of notice to the parties whose rights were affected.

Mullane caused much interest to legal writers, law revision commissions, and state legislatures.

36 Iowa L. Review 47 (1950);
39 Iowa L. Review 665 (1954);
100 U. Pennsylvania L. Review 305 (1952);
30 Mich. St. B. J. 12 (1951);
50 Mich. L. Review 124 (1951);
Perry "The Mullane Doctrine—a Reappraisal of Statutory Notice Requirements" Current Trends in State Legislation 32 at 118 (1952).

Of course, New York revised §100 (c) (12) of the Banking Law to require mailing.

A subsequent article in 39 Iowa L. Review 665 advised that North Carolina revised its N. C. Gen. Stat. §§1-98, *et seq.*, relating to publication and now requires mailing, and that Iowa (Iowa Rule 60, Rule 60.1 added) changed its statute to require mailing of notice or an affidavit that a diligent inquiry was made and that no address was found.

As a matter of fact the Iowa Law Review article above mentioned actually forecast the *Walker* case. At page 671 it mentioned the inadequacy of the Kansas statute in view of *Mullane!*

Mullane was followed by *Gillespie v. Fort Dodge, D., M. & S. Ry. Co.*, 203 F. 2d 119 (8th Cir., 1953), a bankruptcy case wherein notice by publication was held inadequate where actual notice was possible.

Also following *Mullane* was *City of New York v. New York, N. H. & H. R. R.*, 344 U. S. 293 (1953), in which the rationale of *Mullane* in point was affirmed.

In the most recent decision, the Court reaffirmed the rule laid down in the *Mullane* case. The Supreme Court struck down a Kansas statute which required in a condemnation proceeding, notice by either publication or personally, the notice actually given in the *Walker* case having been by publication. The Court said (*Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, 77 S. Ct. 200, December, 1956):

> "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. *In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.*" (Italics added.)

Walker is the most recent United States Supreme Court case on this question that we know of. It is of interest to know that the situation is more aggravated here and more deserving of relief than that situation existing in

said *Walker* case. In said case, Mr. Lee Walker's property was taken and commissioners met without his knowledge and made to him an award for his property in the amount of $725. Mr. Walker was not satisfied with said award when he learned of it, and sought resort to the courts.

In the instant case, Miss Schroeder received and shall receive nothing for her property, unless she prevails here.

At the same term of court with Walker was *Wisconsin Electric Power Co. v. Milwaukee,* 352 U. S. 948. This case was remanded on the same grounds as Walker. That case involved the levy of assessments by Milwaukee against owners of property abutting on a certain street, notice having been given by publication only, under the City charter. The complaint in a first action asking for cancellation of assessment on grounds of unconstitutionality of statute was dismissed on demurrer. The Supreme Court of Wisconsin, after *Mullane,* and because of an evenly divided Court, affirmed 263 Wisc. 111, 56 N. W. 2d 784.

After the decision of the U. S. Supreme Court in *City of New York v. New York, N. H. & H. Ry. Co., supra,* Wisconsin Electric started its action over again, for no new reason other than in view of the *City of New York* case reaffirming and strengthening *Mullane* it decided this time to go to the U. S. Supreme Court. Again a demurrer to the complaint was sustained in the Circuit Court, and on appeal the Wisconsin Supreme Court again affirmed, but this time only on the principle that there must be finality to litigation, and on the theory of "law of the case." 272 Wisc. 575, 76 N. W. 2d 341.

The U. S. Supreme Court remanded, 352 U. S. 948; order amended 352 U. S. 958; and the Supreme Court of Wisconsin reversed, 81 N. W. 2d 298.

The statute involved in the *Wisconsin* case was Section 11.20 of the Milwaukee City Charter Compilation of 1934, and required four days publication of the official papers in said city.

Subsequent to the reversal by this Court, the City of Milwaukee now proceeds under Section 66.60 of the Wisconsin Statute which requires as follows:

> "66.60 *Special assessments and charges.* • • •"
>
> "(7) • • • Such notice shall be given either by publication of a copy of the notice at least once in a newspaper published or having a general circulation in such city or village, or such notice shall be posted in not less than 5 public places within the city or village of which at least 3 shall be within the assessment district and a copy of such notice shall be mailed to every interested person whose post-office address is known, or can with reasonable diligence be ascertained, at least 10 days before the hearing or proceeding. • • •"

After the public hearing, if the plan is approved, the clerk is required to do as follows:

> "(8) (d) The city or village clerk shall publish the final resolution in a newspaper published or having a general circulation in said city or village, or such resolution shall be posted in not less than 5 public places within the city or village, of which at least 3 shall be within the assessment district and a copy of such resolution shall be mailed to every interested person whose post-office address is known, or can with reasonable diligence be ascertained."

It is, therefore, apparent that the interpretation given by the Wisconsin authorities to the rule in the *Walker* case is that more than publication is required, at least mailing to every interested person whose post-office address is known or can with reasonable diligence be ascertained.

We also call attention to the requirement in the above-quoted statute for the newspaper publication to be in a newspaper "published or having a general circulation in said city or village."

Under the statute questioned in the instant case, there is no such requirement except that the publication be in two newspapers published in the county where the properties are located.

Upstate New York counties are fairly large. Orange County has no less than 3 incorporated cities, Middletown, Port Jervis and Newburgh. Said county has 16 incorporated villages and numerous unincorporated hamlets. It is at least 50 to 60 road miles long and wide, generally, and spread out all over the entire county was a population of 152,255 persons as of the 1950 U. S. Census, and 183,734 persons as of the 1960 U. S. Census. The absence of a requirement in the statute to publish in newspapers having a circulation in the area of the taking was used by appellee to hide the newspaper notices in small newspapers in distant communities having no possible circulation in the area of the taking, despite the availability of newspapers with circulation in the area of the taking.

More than half of the property owners whose properties were mapped and numbered and whose names appeared on the maps prepared by appellee prior to this proceeding did not receive notice of the taking of their property.

Had the rule of law established by this court in the above cited cases been applied here, and had this statute contained the simple requirement for the mailing of notices, we believe there would have been few if any late filed claims.

It is, therefore, respectfully submitted that this statute is, on its face, inherently defective and should be so declared.

POINT II.

The learned New York Court of Appeals, in its majority opinion erred in applying the facts and stating the law in several important respects.

The criticism in this brief of the majority opinion of the New York Court of Appeals is made with the greatest respect for a truly great court, and we know that the faults expressed in this brief will be viewed in that light.

The court below failed completely to distinguish between the application being made at Special Term on March 14, 1952, and the proceedings subsequent thereto dealing with the filing of claims and the making of compensation to property owners.

The notice that was published in the newspapers commencing in January, 1952, and the 22 handbills posted on trees and poles on January 22, 1952 (R. 23), was merely a notice of motion. This notice is in this record on pages 21 and 22.

The Court will note that it is merely a notice of motion relating only to an application being made to acquire the right to divert the river, and for the Court to appoint commissioners of appraisal. It was returnable at Special Term on March 14, at which time any person interested had the right to appear and object to the taking. Obviously, it was not an *ex parte* application, but instead one made on notice. In fact, on the return date of the application made in Section #1, which is near the Neversink dam in Sullivan County, four attorneys appeared, submitted answers to the City's petition objecting to the taking of all of the water and the Court reserved decision. Subsequently a compromise was arrived at between the said attorneys representing various property owners and the Corporation Counsel of the ap-

pellee wherein the appellee agreed to make certain minimum releases from the dam into the river. That is the reason that the order of condemnation in all sections contain a decretal provision, which is the last paragraph of the order, directing the appellee to release three million gallons daily from November 1 through April 7, and ten million gallons daily from April 8 through October 31 in each year (R. 37).

It is only after this order of condemnation is made, and after the commissioners appointed in said order execute oaths of office which are filed in the county clerks' office that title vests, and the statute of limitations commences to run for the filing of claims.

Of course, nothing was done in the river at the time of the pendency of the application.

Consequently the only notice that could possibly have been properly considered by the Court below was the notice required by the statute itself. The reference in the opinion of Judge Fuld to visible effects of the actual diversion certainly have no bearing on the notice of the application for the order of condemnation, if it is at all relevant to any phase of this case. The fact that the notices tacked on trees and poles in January were on so-called "durable cloth" and may have been in certain instances readable for some time thereafter likewise is of no significance in that it was known that the properties affected were mainly summer occupied only.

Judge Dye, in the dissenting opinion said with respect to this:

> "The posting and publication were done in the month of January and although in compliance with the letter of the statute such publication and posting in such remote places at a time when it was known that the subject premises would be vacant, it seems to me fail to comply with its spirit and

intent and as matter of fact failed to give this plaintiff and numerous others, similarly situated any reasonable opportunity of knowing that such a proceeding was pending" (R. 50).

This appellant had the right to appear on the return date of the application at Special Term, and to object to the taking, had she known of the proceedings. This right is separate and apart from the right to compensation for the taking of her property. Yet, the Court below failed to distinguish this as a separate and distinct right, considering only her right to file a claim. Had the learned Court considered this separate important right, it could not have very well considered to be of great "significance" the assumption of the so-called apparent effect of the diversion, which diversion occurred more than a year *after* her right was gone.

The footnote to Judge Fuld's opinion dealing with newspaper notice in this instance and excusing the publication in distant newspapers on the grounds that no newspaper is published in the particular community where this property is located must have been lightly made. Since the properties involved in this particular condemnation are necessarily along a river in a rural area, it would indeed be too much to expect to find a newspaper published in each hamlet or community through which the river runs. The absence of a newspaper published in the community in which Miss Schroeder's property is located does not justify by any means publication in the far ends of the county in newspapers which are known to have no circulation whatever in the taking area, where it is a matter of public knowledge that the City of Port Jervis, seven miles from the property, has a large newspaper circulating in the area of the taking, and the City of Middletown, eight miles away, also has a newspaper circulating in the area of the taking. Yet these two newspapers were by-

passed for safe newspapers where the appellee had excellent reason to believe they would not be seen by any property owners in the area of the taking.

If there were a taking, for example, in Arlington, Virginia, and if Arlington had no newspaper published therein but was covered by Washington newspapers, could publication in a Philadelphia newspaper be justified to provide notice to property owners in Arlington?

It is further respectfully submitted that the Court of Appeals improperly distinguished this case from *Mullane* on the grounds that the instant case deals with real property and Mullane dealt with less tangible property. The Court overlooked the fact that *Walker* also involved the taking of real property.

It is respectfully submitted that the Court below made a distinction without a difference. The constitution does not distinguish between property real and personal, tangible and intangible. So long as it is property, it cannot be taken without due process of law, an essential ingredient of which is adequate notice consistent with the American principles of fair play.

We further respectfully point out to this Court that the majority of the court below erroneously assumed that the effects of the diversion were visible at the Schroeder property, long before the expiration of the statutes of limitations to file claims and that this constituted a sort of extra-statutory notice that cured the statutory defects. This reliance by the learned Court upon such an assumed fact was in the language of Judge Fuld "of considerable significance." There should be no doubt but that the reliance by the Court of Appeals upon this assumption was of great importance in its determination of whether or not this statute complied with due process.

This, the Court should not have done for many reasons.

Firstly, it has already been mentioned that this could not possibly have been a consideration with respect to notice of the application to appoint commissioners returnable March 14th, 1952, as it occurred later.

Secondly, this is and was an appeal from an order and judgment made on a motion addressed to the pleadings.

The motion and cross-motion here were both made under Rule 112 of the New York Rules of Civil Practice (R. 5, 6).

Such a motion addressed to the pleadings is equivalent to the common-law demurrer and the factual allegations, for the purposes of the motion, are deemed true. Affidavits are not used for this reason on such motions, the only papers on such a motion being the Notice of Motion, and the pleadings.

By way of explanation, the affidavits annexed to appellee's answer were exhibits which were part of the answer, and were not separate affidavits used on this motion.

The same is true of Section 476 of the New York Civil Practice Act (*Gordon v. N. Y. Institute of Optics*, 1950, 277 App. Div. 1100, 101 N. Y. S. 2d 192), the same also being true of Rule 109 (6) of the New York Rules of Civil Practice (*Landefeld v. Seibert*, 1959, 8 A. D. 2d 973, 190 N. Y. S. 2d 832).

Consequently, the learned Court below should not have assumed the truth of a fact, no reference to which was made in the pleadings, and which alleged fact was strongly disputed by both sides in the briefs.

The appellee in its answer does not allege that effects of the diversion were visible in this case. If it had it would have been denied in the reply.

A study of the figures of late-filed claims strongly shows the truth of appellant's position.

For example, Section 1 consists of approximately the first seven or eight miles of river downstream from the dam. This close to the dam the effects of the diversion, nearly 100%, are more apparent. In this section only 13 out of 85 owners of numbered parcels or about 15% failed to file in time. However, in Section 2 further downstream, 23 out of 83 owners of numbered parcels, or approximately 28%, failed to file in time. In Section #3, 43 out of 76 owners, or approximately 59%, failed to file in time; in Section #4, where the Schroeder property is located, 78 out of 96 or approximately 81% failed to file in time; and in Section #5, which is the last seven or eight-mile section of the Neversink River into its confluence with the Delaware, 67 out of 82 owners, also 81%, failed to file in time.

It is therefore apparent that there is a grain of truth in the Court's contention concerning the apparent effect of the diversion, but not much more. These figures prove appellant's contention that as one goes further downstream the effects of the diversion are less visible.

The reason is that as the stream winds and turns in its travels to the Delaware River, about 35 miles below the dam, it picks up substantial quantities of water from its tributaries and from ground water in the drainage area of the stream, so that as one travels further downstream the percentage of diversion decreases, the same at the Schroeder property being in the neighborhood of a 50% diversion.

The diversion of a percentage of the stream, even a very high percentage of the stream, does not necessarily substantially lower the height of the stream. The most drastic effect of the diversion is its decrease in velocity of flow.

For example, a natural pool in the river will be full, whether there are 30 million gallons per day coming into it, or 300 million gallons per day. The thing that changes in such an instance is its velocity.

Prior to the diversion, the Neversink was known as a "flashy" stream and on the average of once a year reached flood stage in varying degrees. This high quantity of water scoured and cleansed the bottom of the stream to its natural sand and gravel stone bed.

In its natural condition its temperature was cool at its headwaters and normal in the rest of the stream. The diversion has impounded the waters in the Neversink Reservoir. Under the taking order of March, 1952, minimum releases must be made. However, under the United States Supreme Court decree appointing a River Master, a formula was established whereby when the water in the Delaware River at Montague, New Jersey, falls below a certain point, the City must release additional quantities from its reservoirs. The result of the foregoing is that at times the City releases the minimal quantities from the reservoir at Neversink and at times very substantial quantities.

The waters released are through the bottom of the dam, the temperature being approximately 39.2 degrees F. at the release works.

Consequently, when the releases are high the temperature in the river for many miles downstream is very low. On the other hand, when the releases are low, because of small quantities and velocity of flow the temperature in the river is unusually high. This situation is drastic to fish life, native trout having been practically eliminated from the stream.

The decrease in velocity, although not necessarily decreasing the depth, has reduced the carrying capacity of the stream, silt and sedimentation have coated the stream

bottom; algae is most proliferous. The freshets or floods being absent, this accumulation on the bottom continues to build up over the long period of years. Fishing is destroyed. Bathing and swimming made more and more uncomfortable as time goes on.

Yet a layman, having no understanding of the technical reasons for the effects of the diversion and looking only at the height of the stream, knowing that the stream fluctuated greatly in its natural pre-diversion state, at a point 25 miles downstream from the dam in a different county, as at the subject property, could not be expected to conclude at a glance that there had been an artificial diversion by the City of New York for water supply purposes for which he was entitled to be compensated.

The suggestion contained in a footnote to the opinion of Judge Fuld to the effect that the great number of claims not filed in time may possibly have been due to a lack of interest, is truly the grossest speculation. We respectfully submit that the Court below should not have so indulged, particularly since the known facts clearly point out the contrary.

If a property owner files a claim, but such claim is late, does this show that he has no interest in what has occurred?

There are a great number of cases involving late filed claims under this statute involving this same Neversink diversion in the lower courts in New York. Two of these cases, *Matter of Huie (Nielsen)*, 6 A. D. 2d 837, 176 N. Y. S. 2d 193, and *Matter of Huie (Riehle)*, 6 A. D. 2d 838, 176 N. Y. S. 2d 197, are representative cases which in themselves involve a large number of claims. There are many more which this writer and the appellee knows of that have been decided at Special Terms, and Appellate Divisions, appeals taken and which are lying dormant waiting for the outcome of this Schroeder case.

We have estimated that the total number of claims actually filed but late, and pending, was about 200. This was contended before the New York Court of Appeals, and before this Court on the question of jurisdiction. The appellee knows exactly how many late filed claims are pending, because claims are filed with the Law Department of the appellee. Yet, the appellee has never come forth and said, for example, that there were not 200 claims but only 100. It could tell us exactly how many there are. Considering the unnumbered parcels which do not appear on the City's maps and which were treated by appellee as if they were not in existence at all, our estimate of late-filed claims may be very low.

We have spoken of claims actually filed being late, but how many more are there which were never filed late because the claimants enquired of the Law Department and were told that it was too late and who never consulted counsel?

The very fact that there are so many of these aggrieved property owners who have their cases in the courts is, in and of itself, the clearest proof that the speculation concerning lack of interest by the learned Court of Appeals was cruel and unwarranted. It is also, we respectfully add, irrelevant.

The footnote to Judge Fuld's opinion that the handbills were printed with permanent ink on durable cloth about 28" long and 18" wide and were firmly affixed and that "they undoubtedly remain legible for years" was not relevant and certainly gave the appellee the benefit of many doubts in taking private property.

There is nothing in the statute that prescribes the material on which the handbills are to be printed nor the type of ink, nor the size. The assumption that these handbills

would withstand the rigors of snow, sleet, ice and rain, being removed by persons or animals is unwarranted, if it is at all relevant in the first place.

The outstanding and the most glaring error found in the reasoning of the majority of the Court of Appeals, shown by its assumption of facts as mentioned above, was in its going beyond the statute to determine its constitutionality.

We respectfully submit that a case that is controlling in this situation is *Wuchter v. Pizzuti*, 276 U. S. 13 (1928).

This case held that extra-statutory notice could not supply constitutional validity to a defective statute.

In the *Wuchter* case there was an automobile accident on a New Jersey highway. The New Jersey statute provided that any nonresident using its highways automatically designated the Secretary of State as agent for service of process. There was no provision in the statute for the Secretary of State to notify the nonresident by mail of this action.

The action was commenced by service upon the Secretary of the State and a judgment interlocutory was taken and a writ of inquiry as to damages was issued.

Although the statute did not require it, notice of its proposed execution, prior to final judgment, was actually served on Wuchter in Pennsylvania, but Wuchter did not appear in the proceeding and final judgment was entered.

The United States Supreme Court held that the appointment of the Secretary of State as agent was allowable under *Hess v. Pawloski*, 274 U. S. 352, but that the statute should have provided for mailing of notice by the Secretary of State to the defendant.

The fact that the defendant did actually receive notice was held to be irrelevant, the Court stating as follows:

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by Statute. Not having been directed by the statute, it cannot therefore, supply constitutional validity to the statute or to service under it, *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co. v. Stock Yards Company*, 212 U. S. 132, 144; *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127, 138; *Security Trust Co. v. Lexington*, 203 U. S. 323, 333; *Roller v. Holly*, 176 U. S. 398, 409; *Stu... v. Palmer*, 74 N. Y. 183, 188; *Berryhill v. Sepp*, 106 Minn. 458."

We have Shepardized the *Wuchter* case and find that it is still the law today, as it should be.

The only exceptions to the *Wuchter* rule are where there has been an appearance in the proceedings, and the only other exception being in the situation where the state courts have construed the statute to require actual notice. Neither is the case here.

Although it is correct that Justices Holmes and Brandeis dissented, and Mr. Justice Stone dissented upon other grounds, it is still good and practical law today. In fact, *Wuchter* was cited as authority in the *Walker, supra*, case in 1956.

Its rationale rests upon the thesis that we live under a government of law, and not by the grace of man. It follows, therefore, that a statute which may deprive a person of his life, liberty, or his property, must contain within itself the necessary safeguards to guarantee due process of law, and not leave the slightest necessary safeguard to chance or to the caprice of men.

It is respectfully submitted that this great principle has been time and again expressed in the following cases:

In the case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915), this Court said on page 424:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said:
>
> "'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and then opportunity to be heard.'
>
> "The soundness of this doctrine has repeatedly been recognized by this Court. Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes:
>
> "'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute (*Stuart v. Palmer*, 74 N. Y. 183).'
>
> "So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 151, 28 Sup. Ct. Rep. 47, the Court said:
>
> "'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' • • • and in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said:

"'The law itself must save the parties' rights and not leave them to the discretion of the Courts as such.'"

It is respectfully submitted that the Court of Appeals in this case cannot be affirmed without overruling the *Wuchter* case and the long line of distinguished cases cited that came before it.

The City of New York would here stand on higher moral ground in asking this Court to overrule *Wuchter* had it made the slightest attempt to apprise as many property owners as possible of the proceedings. Had the appellee mailed notices or ordinary letters to the property owners, had they published in newspapers having circulation in the areas affected; had they published their notices in stores, post offices, garages and other public places in the areas of the taking instead of on trees and poles along the river, had they made the slightest attempt to follow the spirit as well as the letter of the statute, it might invoke some sympathy in its behalf. However, in view of its conduct here, there is no moral armament for its onslaught against the *Wuchter* rule.

If this statute is upheld in this case, the next condemnation by appellee may have a diversion take place after the expiration of the statute of limitations. This is not a speculation. To buttress the existence of this possibility, we point out that in the case of the appellee's diversion of the Rondout, it acquired the right to divert on May 6, 1941, and the date of the actual diversion was April 3, 1944, just one month short of the expiration of the statute of limitations to file claims. If this instant case had involved the Rondout taking instead of Neversink, what type of actual notice could the Court of Appeals have relied on other than the entirely constructive notice of the statute itself?

The statute nowheres requires the City to act upon acquiring title. It could, in any situation, wait more than three years (having waited two years and 11 months in the Rondout case) before physically taking the property.

In the instant case, the City divided the 35 miles of river into five sections. This was arbitrarily done, the statute containing no limitations. Appellee could have divided the 35-mile stretch of river into only two sections, using only 20 handbills in each such section. The statute contains no requirement as to the size of the handbill, nor of the material to be used. There is, consequently, no prohibition against the use of legal size onion skin paper so common in foreclosure and election notices.

It is known, however, that appellee could not have done much worse on the newspaper notices, having already shown its inclination to select those most distant from the property but still within the boundaries of the county.

It is therefore respectfully submitted that the *Wuchter* case should be followed, and not overruled. The statute should, in its own language, contain the necessary minimum safeguards to ensure due process of law in its operation. Notice, which is such an essential ingredient of due process, should be provided in the statute itself, and not left to a fortuitous circumstance, nor to the grace or favor of the user of the statute.

The instant case is stronger than *Wuchter* for the reason that actual notice by mailing was had in *Wuchter*, while no notice was had here except for what the Court below erroneously assumed to be an apparent effect of the diversion.

POINT III.

The appellee deliberately took advantage of this defective statute to acquire property without compensation.

Judge Dye, in his dissent in the court below, stated:

> "If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected" (R. 51-52).

This statement was not made lightly.

This brief has already made mention of the bypassing of the newspapers in Port Jervis and Middletown, seven and eight miles respectively, from the subject property, and with circulation in the area of the subject property, for distant newspapers.

The appellee will not deny, as the County Clerk's records show, that the newspaper publications in Orange County were made in the Chester Bulletin of Chester, New York, and the Valley Dispatch of Warwick, New York.

The Orange County Data Book for 1962, published by the Orange County Planning Department, County Building, Goshen, New York, lists the circulation figures for the newspapers with which we are here concerned. The Union Gazette (Port Jervis) has a circulation of 4,000; the Middletown Record, 24,900; the Warwick Valley Dispatch, 3,000; and the Orange County Post, 3,000. The Middletown Record was, in 1952, the Middletown Times Herald with a circulation probably lower than the above figure. However, the Chester Bulletin used in 1952, is no longer in existence and undoubtedly had a smaller circulation than the figure for the Orange County Post, published in Washingtonville, N. Y., covering said community and Chester and Florida, N. Y.

A glance at any responsible highway map of New York State would promptly show that the Chester and Warwick papers could certainly not be expected to have any circulation in the taking area, said communities being 30 to 40 road miles from this property.

This is not an isolated, unusual, circumstance. In adjoining Sullivan County, publication was had in the Liberty Adviser, the newspaper of the least circulation in Liberty, New York, and also in the Sullivan County Democrat, published in the far western Sullivan County hamlet of Callicoon, New York. The above places of publication are matters of public record, as affidavits of publication are on file in the respective County Clerk's offices, which the appellee will certainly not deny.

Section #3 is in Sullivan County and is just east of Monticello, New York, the county seat, which has no less than three newspapers published therein, all of which were bypassed for "safe" newspapers of limited circulation, having no circulation whatever in the area of the taking.

With respect to the handbills, let us just look at Section #4 which contains the subject property. In said section, there are 96 numbered river front parcels, and a great many upland parcels with deed rights-of-way across numbered parcels to the river, which upland parcels are not shown on any map and which property rights were treated by appellee as if they did not even exist. For example, in Section #4, there is located a development known as Meyers Grove which has in the neighborhood of 100 properties, all of which have deed rights to bathe, swim and fish in the Neversink River. In fact, the case of *Application of Huie (Nielsen), supra*, involves a great many of these Meyers Grove properties.

For all of these properties, appellee posted 19 handbills on trees and three on poles, said posting having been done on January 22, 1952 (R. 23).

Since the Neversink River Valley had been developed as a summer resort area, it was known that most properties would be vacant at that time of year.

It should not be disputed but that appellee intended even the handbills to attract as little attention as possible. This is apparent from the following facts:

Section #4 runs through the Hamlets of Cuddebackville, Huguenot and Godeffroy (see Map, Exhibit A, annexed to Answer, in the Exhibit File).

Cuddebackville has a post office, a fire house, a Town Clerk's office, a school, at least two general stores, as well as a church and several gas stations.

Huguenot has a post office, a Grange Hall, a municipal building and office and general stores.

Godeffroy also has a post office, general store, and a gas station.

Yet, not one handbill was posted in any of these public places!

It is respectfully submitted that any design to attract attention to the handbills would have utilized these places where the posters could have been sheltered from the weather and seen and read by at least those few year-round residents who would trade and socialize at these places.

Instead, the City posted as it did on trees and poles along lanes, dirt roads in the forest and a highway which certainly at the time of year in question would not accomplish the purpose of giving notice. In fact, the notice could not be read from a passing automobile and in order to be read, would require people to walk off the road onto private property, if, in the first place, the notice could be distinguished from the ordinary "No Trespassing, Hunting or Fishing" signs.

This type of notice may have accomplished its purpose in 1905, the year the statute was enacted. However, by 1952, Orange County and also Sullivan County have absorbed the impact of the summer vacationist and summer resident from the great metropolitan areas of New York City and vicinity. Together with the very substantial growth of population, came the increase in the number of communities and certainly the number of newspapers. It is reasonable to say that a notice stuck on a tree in January of 1952 received far less note and comment than it would have in 1905.

Yet, the appellee made no concession to the changing times. It knew the names and addresses of the owners of the properties along the river that it had mapped, and disdained to even send them a letter. It worked quietly and effectively with tongue in cheek, giving only the minimum notice required by the letter of the statute, and awaited the expiration of the statute of limitations.

CONCLUSION.

It is the position of appellant that her property was taken from her without compensation and without due process of law.

It is her position that this came about by reason of the failure of the statute in question to provide for any form of personal notice, said statute relying entirely on notice by publication.

It is also the contention of appellant that the holding of constitutionality by the New York Court of Appeals could not possibly be reconciled with the cases heretofore decided by this Court and mentioned in this brief, the said Court having looked beyond the language of the statute to consider and speculate with respect to other notice that may have fortuitously occurred.

It is also the contention of the appellant that the great number of property owners who have been deprived of their property without compensation in the Neversink proceeding is a shocking commentary upon the practical workability of this defective statute.

Appellant realizes that she cannot interfere with nor does she actually seek to interfere with the appellee's water supply system. However, she does feel that she is entitled to her day in court so that she could file her claim for compensation and be heard as to the extent of her damages.

Consequently, the appellant requests that this Court hold the statute in question unconstitutional and reverse the order (remittitur) and judgment of affirmance of the Court below.

Respectfully submitted,

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APPENDIX.

Title K41-11.0, Administrative Code of City of New York:

> Vesting of title; possession; removal of buildings or improvements.—On Filing such oaths, in the manner provided in section K41-10.0 of the code, the city shall be and become seized in fee of all those parcels of real estate which are on the maps referred to in section K41-5.0 of the code delineated as parcels, of which it has been determined that the fee should be acquired, and shall also be and become vested of the easements, in, over, upon or through all those other parcels of real estate which are on said maps delineated as parcels in, over, upon or through which it has been determined that easements should be acquired; • • •

Title K41-18.0, Administrative Code of City of New York:

> Limitation of time for presenting claims.—All claims of every name and nature under this article, except claims provided for under section K41-22.0, must be exhibited and presented to the commissioners of appraisal having jurisdiction of the same within the following periods of time:
>
> (a) in the case of real estate acquired in fee or in which an easement is acquired, within three years after title thereto shall have become vested in the city;
>
> (b) • • •
>
> In the case of real estate acquired in fee or in which an easement is acquired, every person neglecting or refusing to present a claim within such time shall be deemed to have surrendered his

interest in such real estate or his claims for damages thereto, except so far as he may be entitled as an owner of, or person interested in the award, if any, made by the commissioners of appraisal. All other claims not exhibited and presented within the time above specified shall be forever barred.

New York Civil Practice Act, Section 476:

§476. Judgment on pleadings or admission of part of cause.

Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require.

New York Rules of Civil Practice, Rule 112:

Rule 112. Motion for judgment on the pleadings after issue joined.

If either party be entitled to judgment on the pleadings, the court may on motion, give judgment accordingly, and without regard to which party makes the motion.

New York Rules of Civil Practice, Rule 109 (6):

Rule 109. Plaintiff's motion on the answer.

After the ser . of an answer, the plaintiff may serve notice c tion to dismiss a counterclaim or strike out a . fense consisting of new matter contained therein, where one or more of the following defects appear on the face thereof:

1. • • •

2. • • •

3. • • •

4. • • •

5. • • •

6. That the defense consisting of new matter is insufficient in law.

If upon a motion made pursuant to this subdivision, it shall appear that the complaint does not state facts sufficient to constitute a cause of action, the court hearing the motion may dismiss the complaint, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just, even in the absence of a cross-motion therefor.

A notice of motion specifying an objection set forth in subdivisions 2, 3 or 4 hereof shall be served within twenty days after the service of the answer. A notice of motion specifying an objection set forth in subdivisions 1, 5 or 6 hereof may be served at any time prior to the trial. • • •

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 75

MADELINE C. SCHROEDER,

Appellant,

—v.—

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

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INDEX

	PAGE
Opinions Below	1
The Statute Involved	1
Question Presented	3
Statement of the Case	3
Summary of Argument	10
ARGUMENT:	
POINT I—	
In view of the fact that the Appellee acquired the right to divert water flowing past the Appellant's property pursuant to a Statute which provided for adequate notice and the fact that the Appellant did not file a claim within the time prescribed by such Statute the Appellant is barred from maintaining this suit for an injunction and from recovering damages	10
A. Where, as here, the right acquired was one to divert water flowing past the property of a non-resident owner whose address was not known and the effect of the diversion was visible, notice by publication and posting for six weeks was sufficient under the Due Process Clause of the Federal Constitution	11

PAGE

B. Statutes which provide that claims for compensation in eminent domain proceedings must be presented timely or they are forever barred are valid under the Due Process Clause of the Fourteenth Amendment. The Appellants failure to present a claim within the time prescribed by the Water Supply Act bars her from maintaining this suit for an injunction and from recovering damages 21

CONCLUSION 25

CITATIONS

Bernstein v. City of Mount Vernon, 109 App. Div. 899, 96 N.Y.S. 458 (2nd Dept., 1905) 8

Benedict v. State of New York, 120 N.Y. 228, 24 N.E. 314 (1890) 22

Bragg v. Weaver, 251 U. S. 57 (1919) 21

Huling v. Kaw Valley Railway and Improvement Co., 130 U. S. 559 (1889) 11, 14, 15

Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891) 23

Mark et al. v. The State, 97 N.Y. 572 (1885) 22

Matter of Huie (Berger), 2 Misc 2d 38, 40, 45, 154 N.Y.S. 2d 824, affd. 2 A D 2d 631 (64), 153 N.Y.S. 2d 610 (1956) 16

Matter of Huie (Cudney), 9 A D 2d 1009 (44), 195 N.Y.S. 2d 30 (3d Dept., 1959) 19

PAGE

Matter of Huie (Fire Commissioners of Woodbourne Fire District), 14 A D 2d 627 (32), 218 N.Y.S. 2d 791 (1961) 16
Matter of Huie (Klass), 11 A D 2d 837 (37), 202 N.Y.S. 2d 954 (1960) 16
Matter of Huie (Lipman), 2 A D 2d 786 (4), 154 N.Y.S. 2d 242 (1956) 16
Matter of Huie (Riehle), 15 A D 2d 931 (13), 226 N.Y.S. 2d 295 (2d Dept., 1962) 19
Matter of Mayor (Vanderbilt Avenue), 95 App. Div. 533, 88 N.Y.S. 769 (1st Dept., 1904) 8
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 11, 12, 13, 18, 20

Nelson v. City of New York, 352 U. S. 103 (1956) 11
New Jersey v. New York, 283 U. S. 336 (1931), 347 U. S. 995 (1954) 17
New York v. New York, N. H. & H. R. Co., 344 U. S. 293 (1953) 13
North Laramie Land Co. v. Hoffman, 268 U. S. 276 (1925) 8, 21

Pierce v. Somerset Railway, 171 U.S. 641 (1898) 22

Rexford v. Knight, 11 N.Y. 308 (1854) 22

Sears v. Akron, 246 U. S. 242 (1918) 21
Stewart v. State of New York, 105 N.Y. 254, 11 N.E. 652 (1887) 22

Wabash R. Co. v. Defiance, 167 U.S. 88 (1897) 24
Walker v. Hutchinson, 352 U. S. 112 (1956) 12, 14, 15, 17, 18, 20
Wick v. Chelan Electric Co., 280 U.S. 108 (1929) 11
Wuchter v. Pizzutti, 276 U. S. 13 (1928) 19, 20

Other Authorities

PAGE

1 L. ed. 2d, p. 1635, et seq. 18, 21

31 C.J.S., Evidence §10 16

31 C.J.S., Evidence §33a 16

Statutes Cited

Administrative Code of the City of New York, Title K

§K41-3.0 5

§K41-5.0 5

§K41-6.0 6

§K41-7.0 ..... 5, 7

§K41-8.0 ..... 1, 3, 5, 6, 7

§K41-9.0 7

§K41-11.0 ..... 2, 8

§K41-18.0 ..... 2, 9, 10, 22

Canal Act, N.Y. Revised Statutes, Sec. 48, Art. 3, Title 9, Part I 22

N.Y. L. 1883, ch. 490, §7 2

N.Y. L. 1905, ch. 724, §8 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 75

MADELINE C. SCHROEDER,

Appellant,

—v.—

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

Opinions Below

Reported below: 14 A D 2d 183, 217 N.Y.S. 2d 975; 10 N Y 2d 522, 180 N.E. 2d 568.

The Statute Involved

Section K41-8.0 of Title K of Chapter 41 of the Administrative Code of the City of New York (hereinafter referred to as the Water Supply Act) is printed at pages 2-3 of the appellant's brief. It provides that notice of the application for the appointment of Commissioners of Appraisal in New York City water supply proceedings shall be published in the City Record, and in two public news-

papers published in the City of New York and in two public newspapers published in each county in which the real estate affected may be located. Such notice must be published once in each week for six weeks immediately previous to the presentation of the petition. And in addition the Corporation Counsel must cause copies thereof to be posted for the same period of time in at least 20 conspicuous places in the vicinity of the real estate to be taken or affected.

This section was derived from L. 1905, ch. 724, §8 which in turn was derived from L. 1883, ch. 490, §7. Notice by publication and posting has been the prescribed form of notice in New York City water supply proceedings since 1883.

The pertinent portion of §K41-18.0 is printed at pages 43-44 of appellant's brief. Section K41-18.0(a) provides that claims for direct damages due to the acquisition of a fee or an easement, as in the present case, must be presented within three years after the vesting of title and §K41-11.0 provides that title vests upon the filing of the oaths of office of the Commissioners of Appraisal.

In this case title vested on June 9, 1952 (R. 8, 18). Actual diversion commenced on June 1, 1953 (R. 9, 18). The appellant never did present a claim for damages to her property and did not serve the summons and complaint in this action until January 12, 1960 (R. 1), almost 7 years after the diversion started and almost 8 years after the defendant acquired the right to divert. It is therefore apparent that if the Water Supply Act is constitutional, as we contend that it is, the appellant is now barred from asserting any claim for alleged damages to her property and from maintaining this suit for an injunction.

Question Presented

Does notice by publication and posting for six weeks, pursuant to Section K41-8.0 of the Water Supply Act, of an application for the right to divert water from riparian property of a nonresident owner, whose address was not known to the City, constitute sufficient notice under the Due Process Clause of the Federal Constitution?

Statement of the Case

(1)

The preliminary steps taken in the Neversink-Riparian Section No. 4 proceeding, pursuant to which the appellee acquired the right to divert water from the appellant's property, are outlined in the appellee's answer (R. 12-20) and the petition in such proceeding attached to the answer as Exhibit D (R. 26-33).

On July 27, 1927, the Board of Water Supply reported to the Board of Estimate and Apportionment recommending a plan for the development of an additional supply of water from tributaries of the Delaware River (R. 27).

A general map of the sources of such additional supply, dated June 21, 1927, accompanied such report (R. 27).

After due and reasonable notice the Board of Estimate and Apportionment held a public hearing concerning such map and plan and thereafter, by resolution dated January 12, 19[illegible], approved and adopted such map as the "final map" of the Delaware project (R. 27-28).

Thereafter such final map was executed and certified in quadruplicate and filed as required by law (R. 28).

On May 25, 1929, the Water Power and Control Commission of the State of New York approved such map and plan (R. 28).

Subsequently, after due notice and public hearings such map and plan were modified, in certain respects not material here, in accordance with a modification map dated July 21, 1938 and such modified map was duly approved by the Board of Estimate of the City of New York and by the Water Power and Control Commission (R. 28-29).

Thereafter the Board of Water Supply prepared six similar maps entitled:

> "Neversink Riparian Section No. 4 Board of Water Supply of the City of New York, Map of Real Estate Situated Along the Neversink River from the Vicinity of Cuddebackville to the Vicinity of Huguenot in the Town of Deerpark, County of Orange, State of New York."

Such maps were duly approved and adopted by the Board of Estimate and a duplicate original thereof was filed in the Orange County Clerk's office on December 5, 1951 (R. 30). A small scale copy of the map was submitted with the answer as Exhibit A (R. 16).

Upon these maps the various parcels, including the appellant's property, which the petitioner therein (the appellee herein) sought to appropriate were laid out and separately numbered. The property division lines of such parcels were delineated thereon.

The cover and index sheets of the map indicate that the name of the reputed claimant or owner of Parcel number 424 was Madeline Schroeder, the appellant herein. Sheet 10 of the map shows the location of Parcel number 424 near top of page.

The Water Supply Act, like other condemnation statutes in general, requires the part taken to be shown. Property not taken need not be shown. For example, if a condemning authority acquires one acre from a ten acre tract, the one acre taken must be shown but the nine acre residue need not be shown.

In the present instance a diversionary easement is involved. The interest acquired lies entirely between the banks of the river and the division lines between such parcels are delineated on the map. The upland boundaries of property not taken, i.e., of the residues, are not shown. Such boundaries are not required to be shown.

The Water Supply Act does not require the names of the owners to be stated on the maps, in the petition, or in the notice of application for appointment of Commissioners of Appraisal (§§K41-3.0, K41-5.0, K41-7.0 and K41-8.0). However, as we pointed out previously, the taking map lists the name of the reputed claimant or owner of Parcel 424 as Madeline Schroeder, the appellant herein.

Section K41-5.0 expressly authorizes the maps to be made and filed in sections and it provides that such sections "shall be so determined that one commission shall not be appointed for a section covering more property than can reasonably be passed upon and awards made by such commission within the limits of a year from the time of the filing of the oaths . . ." The Neversink proceedings were divided into five sections, which contained an average of 84 parcels each, a number which a commission could reasonably be expected to dispose of within one year. Accordingly the division of the proceedings into sections was not arbitrary as claimed in the appellant's brief, p. 36, but was in accordance with the statute.

The Corporation Counsel, pursuant to §K41-8.0, prepared a notice of application for appointment of Commissioners of Appraisal. Such notice stated the object of the application, the time and place of the application, described the real estate in which it sought to acquire a diversionary interest, with an enumeration of the parcel numbers and a reference to the taking map and the date it was filed in the Orange County Clerk's office (R. 21-22).

The title in the Neversink Riparian proceeding identified the proceeding and indicated the nature thereof. The title not only revealed that the proceeding was pending in the Ninth Judicial District, which was the proper district, but it also indicated that the properties affected were located in Orange County (R. 21, 23, 26) and the notice indicated more specifically that such properties were situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot (R. 22). The map was filed in accordance with §K41-6.0 and the notice, in accordance with §K41-8.0, recited that the map was filed in the office of the County Clerk of Orange County on December 5, 1951. There is therefore no basis whatever for the charge contained in the *amicus curiae* brief of Messrs. Goldstein and Goldstein (p. 5), that the title of the proceeding was defective or that the map and papers in the proceeding were not properly filed.

The notice was published once in each week for at least six weeks immediately previous to the presentation of the petition and was posted for the same period of time in at least twenty conspicuous places in the vicinity of the real estate in which the petitioner sought to acquire an interest (R. 8, 16-17, 23-26, 36).

Section K41-8.0 provides that the handbills shall be posted "on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected." The handbills were

therefore posted along the river, in the vicinity of the real estate affected, in accordance with the provisions of the statute. The notice was both published and posted in accordance with the provisions of the Water Supply Act (R. 16, 21-26, 36).

The petition in such proceeding sought the right and easement in perpetuity to divert certain waters from and release certain waters into the Neversink River (R. 31). It was signed and verified by the President of the Board of Water Supply (R. 33-34) and it set forth the action theretofore taken by the Board of Water Supply and the Board of Estimate, the filing of the maps, and prayed for the appointment of Commissioners of Appraisal (R. 27-30, 33). The petition contained a general description of the real estate in which an interest, right or easement was sought to be acquired as well as a more particular reference to the parcel numbers as given on the taking map (R. 32). All of this was in accordance with the provisions of §K41-7.0.

Sections K41-7.0, K41-8.0 and K41-9.0 relate to applications for the appointment of Commissioners of Appraisal. Sections K41-7.0 and K41-9.0 provide for the presentation of the petition upon the application at the time and place mentioned in the notice, at which time the petition in Neversink Section No. 4 was presented as prescribed by the statute. The statute does not require the petition to be presented before the publication and posting of the notice. The map was, however, filed previously, as appears from the notice (R. 22). In the circumstances the notice, without the petition, was as effective as a summons served without a complaint.

The order appointing Commissioners of Appraisal therein was entered in the Orange County Clerk's office on May 29, 1952 (R. 17).

The Commissioners of Appraisal subscribed their oaths of office on June 2, 1952 and the oaths were filed in the Orange County Clerk's office on June 6, 1952, and in the New York County Clerk's office on June 9, 1952 (R. 8).

The City of New York thereupon became vested with the right to divert and release water as specified in the petition and order and as shown on the taking map, pursuant to §K41-11.0 of the Water Supply Act.

Actual diversion commenced on or about June 1, 1953 (R. 9).

Thereafter Commissioners were appointed to succeed the original Neversink Section No. 4 Commissioners and ultimately Section No. 4 was consolidated with Sections 3 and 5 and Commissioners were appointed for Consolidated Sections Nos. 3, 4 and 5.

It is therefore apparent that the notices, the "final maps", the six similar maps and the petition, were all in accordance with the provisions of the Statute.

Although there is a presumption that a municipality has complied with all statutory conditions (See *Matter of Mayor (Vanderbilt Avenue)*, 95 App. Div. 533, 538-539, 88 N.Y.S. 769, 772 (1st Dept., 1904) and *Bernstein v. City of Mount Vernon*, 109 App. Div. 899, 96 N.Y.S. 458 (2nd Dept., 1905)), there is no necessity for the appellee to rely upon such presumption in this case because we have demonstrated compliance and the appellant in her pleadings and brief raised no issue with respect to such compliance (See appellant's brief, pp. 5, 8, 10). Furthermore, this Court is bound by the finding of the New York Court of Appeals that the procedure followed here complied with the statutory requirement. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, at p. 282 (1924).

(2)

The Neversink Dam and Reservoir were constructed on the Neversink River in accordance with the plans approved in the above mentioned proceeding.

The appellant, a resident of New Jersey (R. 8), is the owner of certain real estate in New York located on the Neversink River downstream from the dam and reservoir.

The City acquired the right to divert on June 9, 1952 (R. 8, 18) and actual diversion commenced on June 1, 1953 upon completion of the dam (R. 9, 18).

The appellant did not file a claim for damages in the riparian proceeding (R. 19), but in January 1960 (R. 12), six and one-half years after the diversion, and seven and one-half years after the acquisition of the right to divert, she commenced the present suit for an injunction restraining the City from diverting water from the Neversink River. The appellant alleged in her complaint that she did not customarily purchase New York newspapers; that she did not see any of the published notices; that she did not observe any of the posters; and that she did not learn that the City had "acquired any portion of her property" or that she "had a right to a claim" prior to her retention of counsel in September, 1959 (R. 9). Significantly, however, the appellant did not allege that she was unaware of the diversion. This is tantamount to an admission that she knew of the diversion although she was unaware that the diversion constituted a taking or that she had a right to file a claim until she consulted an attorney.

The appellee by its answer interposed the defense of the three year statute of limitations contained in Section K41-18.0 of the Water Supply Act. After the appellant served a reply (R. 37-38) in which she in effect admitted

compliance by the City with the various steps prescribed by the Water Supply Act but denied that the City had acquired the right to divert water from the river and that her action was barred (See appellant's brief, p. 10), the City moved for judgment on the pleadings which motion was granted and the complaint was dismissed. This action of the lower court was sustained on appeal to the Appellate Division and to the New York Court of Appeals.

Summary of Argument

Since the notice given here was adequate and the appellant failed to file a claim for damages within the time prescribed by statute she is barred from maintaining this suit for an injunction and from recovering damages.

ARGUMENT

POINT I

In view of the fact that the appellee acquired the right to divert water flowing past the appellant's property pursuant to a statute which provided for adequate notice and the fact that the appellant did not file a claim within the time prescribed by such statute the appellant is barred from maintaining this suit for an injunction and from recovering damages.

The appellant did not present her claim in the water supply proceeding within three years of the filing of the oaths of office of the Commissioners of Appraisal on June 9, 1952, or within three years from the actual diversion on June 2, 1953. Therefore her claim is barred by the Statute of Limitations provided for in §K41-18.0 and by laches and she cannot maintain this suit for an injunction.

A. Where, as here, the right acquired was one to divert water flowing past the property of a nonresident owner whose address was not known and the effect of the diversion was visible, notice by publication and posting for six weeks was sufficient under the Due Process Clause of the Federal Constitution.

Due process does not require personal service in every type of proceeding, especially in the case of nonresidents. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In *Huling* v. *Kaw Valley Railway and Improvement Co.*, 130 U.S. 559 (1889), this Court held that as against a nonresident owner notice of the condemnation proceedings by thirty days publication did not violate due process even though the owner had no actual notice.

For another condemnation case in which this Court held that notice by publication for two successive weeks in any newspaper published in the county where the lands were located was sufficient service upon a nonresident; see *Wick* v. *Chelan Electric Co.*, 280 U.S. 108 (1929):

Even when a resident is involved personal service is not always required. An *in rem* foreclosure of property for arrears of water charges was upheld in *Nelson* v. *City of New York*, 352 U.S. 103 (1956), where notice was published, posted and mailed to the owner in accordance with the provisions of the statute, even though the owner never received the mailed notice which was concealed by his bookkeeper. This Court recognized that publication, where reinforced by other acts such as service by posting and mailing, was sufficient and that personal notice was not indispensable to due process.

The test of the constitutionality of a notice is whether it is reasonably calculated, under all of the circumstances,

to apprise interested parties of the pendency of the proceeding. *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950), cited in appellant's brief (pp. 13, 15, 19), *Walker* v. *Hutchinson*, 352 U.S. 112, 115 (1956) (appellant's brief, pp. 13, 19).

The *Mullane* case, *supra*, held that notice by publication alone for the settlement of an account in a common trust fund pursuant to the New York Banking Law, was inadequate as to beneficiaries whose names and addresses were *known* to the trustee. Such notice was held to be adequate as to beneficiaries whose addresses were *unknown* and did not come to the attention of the trustee in due course of business, and the objections to such notice on behalf of the latter beneficiaries, as well as those whose interests were future or conjectural, were expressly overruled even though the interests or addresses could have been discovered upon investigation (339 U.S. 317-318).

Although the complaint in the present case does not allege that the appellee knew the appellant's address, the appellant intimates that the appellee knew the appellant's address (appellant's brief, p. 3) or that the address was "at hand" (appellant's brief, p. 12). The fact is that although the appellee, of course, knew the location of the subject property it did not know the appellant's address. Furthermore, the appellee was under no obligation to attempt to ascertain the address of the appellant because the statute did not require either personal service or service by mail.

This Court in the *Mullane* case recognized that notice by publication would be sufficient if reinforced by other acts when it said (p. 316):

> "It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey

> a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification."

In the present case the notice was posted as well as published and the diversion of water from the river was the equivalent of an entry upon the plaintiff's real estate. Therefore, the notice given in the present case complied with the rule set forth in the *Mullane* case.

New York v. *New York, N. H. & H. R. Co.*, 344 U.S. 293 (1953) (appellant's brief, pp. 13, 19, 20), involved a railroad reorganization proceeding where the City had a lien for taxes upon specific parcels of land owned by the railroad. The Bankruptcy Act provided that the judge should require "reasonable notice" of the period in which claims should be filed "by publication or otherwise" and should require proper persons to file a list of all known creditors, the amount and character of their claims and their last known post office addresses. The District Court issued an order directing creditors to file their claims by a prescribed date, after which unfiled claims would be barred. The railroad was required to mail copies of the order to the mortgagees and to all creditors who had already appeared in the proceeding. The notice given to other creditors, including the City, consisted of two once-a-week publications of the order in five daily newspapers, only one of which, the Wall Street Journal, was published in New York. The City did not receive a copy of the bar order and did not

file its lien claim within the period designated in the order. Although the railroad and the bankruptcy trustees knew of the City's lien the City was not listed as a creditor and although notice was mailed to the railroad's mortgagees, whose lien was subordinate to that of the City, notice was not mailed to the City. If the City had been listed as a creditor in accordance with the statute, notice probably would have been mailed to the City too. It appeared that the City knew that reorganization proceedings were pending in court. However, the time limitation for filing claims was not prescribed by the statute, as it is in the present case, but by the bar order. Under these circumstances, this Court held that such publication was ineffective to bar the City's claim and that the City had a right to assume that the statutory "reasonable notice" of the bar order, which prescribed the date by which claims had to be filed, would be given. This Court recognized, however (p. 296), that notice by publication may be justified when the names, interests and addresses of persons are unknown. As previously indicated, the address of the appellant in the present case was not known to the City.

Walker v. *Hutchinson*, 352 U.S. 112 (1956), cited in appellant's brief (p. 19), involved the constitutionality of a Kansas condemnation statute which required a city to give landowners ten days notice of the time and place of the proceeding and further provided that such notice could be given either "in writing * * * or by one publication in the official city paper * * *." The petitioner's name was not only known to the city but was on the official records. Nevertheless, he was not notified of the proceeding, the condemning authority relying entirely upon a single publication in a newspaper. This Court held that, under the circumstances of that case, the notice by publication fell short of the requirements of due process. The opinion (p. 116) cited the *Huling* case, *supra*, and referred to the fact that the

plaintiff in that case (like the appellant here) was a non-resident as a ground for distinguishing the *Huling* case from the *Walker* case where the plaintiff was a resident. In *Walker* there was nothing to reinforce the single publication.

In the instant case the notice was published in the City Record, and in two public newspapers published in the City of New York and in two public newspapers published in each county in which the real estate affected was located. It was published once in each week for seven weeks immediately previous to the presentation of the petition. And in addition the copies thereof were posted for the same period of time in 22 conspicuous places in the vicinity of the real estate taken or affected (Def. Exs. B and C; R. 21-26).

The notices which were posted in the riparian proceeding here were printed with permanent ink on canvas approximately 24¼ inches long and 18 inches wide and firmly affixed to the places to which they were attached. One of the notices was posted on a pole on the westerly side of the Neversink River at the corner of Route 209 and the road to a railroad station (Def. Ex. C; R. 17, 24, 26). As appears from sheet No. 10 of the condemnation map (Def. Ex. A; R. 16) the road to the railroad station from Route 209 was a short dead-end road, over approximately 1200 feet of which it was necessary for the appellant to pass in order to reach her property (Parcel 424). It was therefore almost as though the notice was posted on the appellant's own driveway.

Contrary to the appellant's contention the appellee was very conscientious about the publication and posting of the notices. The notices were published seven times instead

of the six times prescribed by statute and twenty-two handbills were posted instead of the twenty prescribed by statute (Def. Ex. C; R. 17, 23). These handbills were posted in the most conspicuous places near the river (Def. Ex. C; R. 17, 23-25). Thus the posting was of such a character as to be reasonably calculated to give these claimants notice.

The complaint in this action alleges great, severe and irreparable damages and that the diversion destroyed the availability of the river for bathing, swimming, fishing and boating (R. 9, 11). The appellant's brief (p. 28) asserts that the diversion amounted to approximately fifty per cent of the flow. These allegations, particularly those regarding the percentage of diversion and the effect of the diversion on boating, charge the appellant with knowledge of the diversion and exclude any other hypothesis except that the effect of the diversion on the Neversink was patently visible. This was not only a proper inference to draw from the appellant's allegations but it was a geographical fact of which the Appellate Division and the Court of Appeals could properly take judicial notice (31 C.J.S., *Evidence* §33a). Furthermore, a court may assume judicial knowledge of facts which it has learned through former litigation (31 C.J.S., *Evidence* §10). The effect of the diversion on the Neversink River was involved in several cases which reached the Appellate Division before or at the same time as the case at bar including: *Matter of Huie (Lipman)*, 2 A D 2d 786(4), 154 N.Y.S. 2d 242 (1956), *Matter of Huie (Berger)*, 2 Misc 2d 38, 40, 45, 154 N.Y.S. 2d 824, affd. 2 A D 2d 631 (64), 153 N.Y.S. 2d 610 (1956), *Matter of Huie (Klass)*, 11 A D 2d 837(27), 202 N.Y.S. 2d 954 (1960), and *Matter of Huie (Fire Commissioners of Woodbourne Fire District)*, 14 A D 2d 627(32), 218 N.Y.S. 2d 791 (1961). It was, therefore, quite proper for the Appellate Division, in the present case, to take into consideration the patently visible effect of the diversion on the river.

The *Walker* opinion stated, at p. 115, that "notice required will vary with circumstances and conditions."

A circumstance bearing on the reasonableness of the notice given here was the size and character of the project. The Neversink Dam is approximately 2800 feet in length (Def. Ex. D; R. 17, 29). The reservoir is approximately 5 miles in length with a maximum width of about 1.5 miles and an average width of about one-half mile and a shore line of approximately 18 miles (Def. Ex. D; R. 17, 30). The construction of such a reservoir involves the removal of hundreds of people from the reservoir area, the relocation of highways and utilities and the employment of hundreds of men, including many local men. The land is cleared of all building and improvements as well as trees and shrubs. Even the remains of the dead are removed from cemeteries in the area to be flooded for reinterment elsewhere. Such proceedings are of great local interest so they are accompanied by a great deal of publicity. Of necessity such proceedings come to the attention of everyone for miles around and particularly to the attention of the owners of properties which are likely to be affected.

The Neversink Reservoir is a part of the famed "Delaware Project" of the City of New York for an additional supply of water which was preceded by litigation and attendant publicity. In *New Jersey* v. *New York*, 283 U.S. 336, 805 (1931) the City of New York was, in effect, permitted to divert 440 million gallons of water daily from certain specified tributaries of the Delaware River, including the Neversink, upon the conditions therein mentioned. Later, the decree was amended in 347 U.S. 995 (1954) and as amended, subject to certain conditions, permits the City to divert 800 million gallons per day after completion of the Cannonsville Reservoir, which was not involved in the original suit. The publicity which accompanied this litigation

tended to bring to the attention of the public and especially to the attention of the owners of properties affected the fact that water would be and was being diverted from the Neversink River.

The construction of the reservoir, the attendant litigation and publicity and the patently visible diversion of water from the river are circumstances and conditions which, under the doctrine of the *Mullane* and *Walker* cases, may properly be taken into consideration in determining that the notice given here was reasonably calculated to apprise interested parties of the proceeding and afford them an opportunity to present their claims.

We submit that under the circumstances the notice required by the Water Supply Act falls well within the constitutional standards referred to in the cases cited and that, accordingly, any attack on the constitutionality of the notice provision of the Water Supply Act must fail. See Annotation in 1 L. ed. 2d 1635 *et seq.* on "Due process requirements as to notice in condemnation proceedings—Supreme Court cases." Accordingly, under the facts and circumstances surrounding the present case the defense of the Statute of Limitations was properly sustained.

As to the alleged failure of a number of owners to file claims, in a proceeding to acquire riparian rights, as distinguished from one to acquire properties in fee, it may be expected that some owners may not file claims, not because they are unaware of the diversion but because they may feel that their properties are not sufficiently affected to justify the filing of claims. As the index sheet of the taking map (Def. Ex. A; R. 16) indicates, fourteen of the parcels in Neversink Riparian Section No. 4, where the appellant's property is located, are mapped to "Unknown" owners. In view of the fact that title to the bed of a stream is frequently in doubt and that a riparian owner who can prove

title only to the bank of the stream usually proves the same elements of damages as could be proved if title to the river-bed parcels could be established, it is not surprising that claims may not have been filed covering a number of such parcels. Other parcels, mapped to known owners, were unimproved and some of the properties were occupied in such manner as to obtain little, if any, benefit from the river.

It also appeared that some of the owners knew of the proceedings but either they or their attorney neglected to file a claim until after the time for filing claims had expired. For example, in *Matter of Huie (Cudney)*, 9 A D 2d 1009 (44), 195 N.Y.S. 2d 30 (3d Dept., 1959), it was apparent that the claimant knew of the proceeding because he filed a timely claim with respect to one parcel but failed to file a claim covering another property in which he was interested until after time for filing claims had lapsed; and in *Matter of Huie (Richle)*, 15 A D 2d 931 (13), 226 N.Y.S. 2d 295 (2d Dept., 1962), the owner retained an attorney in plenty of time to file a claim; the attorney wrote the Corporation Counsel inquiring about the procedure to be followed, without mentioning the parcel number or the name of his client; and the Corporation Counsel mailed the attorney a form of claim to be used and a copy of the Water Supply Act, but the attorney failed to file a claim within the statutory period. In any event the failure of owners of other parcels to file claims for damages to their properties does not excuse the appellant for her failure to file a claim within the statutory period.

Wüchter v. *Pizzutti*, 276 U. S. 13 (1928), cited in appellant's brief pp. 32, 33, 35, 36, held that actual notice of service of proposed execution in Pennsylvania did not validate a judgment rendered in accordance with a non-resident motorist statute of New Jersey which provided for service on the Secretary of State but did not require

the Secretary of State to mail the notice to the defendant. That case, which was decided in 1928 and in which Justices BRANDEIS, HOLMES and STONE dissented, is apparently inconsistent with the later holding of this Court in the *Mullane* case, *supra*. There notice by publication was held to be sufficient as to beneficiaries whose addresses were not known or whose interests were conjectural or future although it did not appear that they had actual notice and this Court indicated (339 U.S. at p. 318), that notice to the known beneficiaries would have been sufficient if the notice had been served personally or by ordinary mail. After citing the *Wuchter* case, the *Mullane* opinion stated (p. 319):

> "Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances."

Also in the *Walker* case, *supra*, this Court said (352 U.S. at p. 116) that even a letter would have apprised the owner that his property was about to be taken and that he would have to appear if he wanted to be heard as to its value. Thus this Court implied that if the owner in that case had had actual notice, or even if a letter had been mailed to him the decision would have been different. The *Wuchter* case, unlike the present case, was not concerned with the tangible and visible.

The notice given in the present case clearly complies with the test previously laid down by this Court for the sufficiency of notice in cases of this kind.

B. Statutes which provide that claims for compensation in eminent domain proceedings must be presented timely or they are forever barred are valid under the Due Process Clause of the Fourteenth Amendment. The appellant's failure to present a claim within the time prescribed by the Water Supply Act bars her from maintaining this suit for an injunction and from recovering damages.

(1)

There is no basis for the appellant's criticism of the Court of Appeals for its alleged failure to distinguish between a notice of application to acquire the right to divert and a notice of hearing in regard to compensation (appellant's brief, pp. 23-25). The notice published and posted here was a notice of the application for the right to condemn and for the appointment of Commissioners of Appraisal. However, the Fourteenth Amendment does not require notice of the necessity and extent of the taking. In *Sears* v. *Akron*, 246 U.S. 242 (1918) this Court held that an Ohio statute authorizing a municipality to condemn property for purposes of water supply did not violate the Fourteenth Amendment because it afforded no opportunity to the owner to be heard as to the necessity and extent of the taking.

The only notice in eminent domain proceedings which the constitution requires is reasonable notice affording the owner an opportunity to be heard at some stage of the proceeding on the question of compensation. See *Bragg* v. *Weaver*, 251 U.S. 57 (1919); *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276 (1925); and Annotation in 1 L. ed. 2d on "Due process requirements as to notice in condemnation cases—Supreme Court cases" at pp. 1636-1637.

The notice by publication and posting and the notice afforded by actual diversion, both being sufficient for such purpose, this constitutional benefit, like many other consti-

tutional benefits, can be waived. The failure of an owner to apply for compensation within the period prescribed by statute may constitute a waiver of the right to compensation.

(2)

The highest New York Court has long held that claims for compensation for property taken by eminent domain must be filed timely or they may be barred. Notable among such cases are: *Rexford* v. *Knight*, 11 N.Y. 308 (1854); *Mark et al.* v. *The State*, 97 N. Y. 572 (1885); *Stewart* v. *State of New York*, 105 N.Y. 254, 11 N.E. 652 (1887); and *Benedict* v. *State of New York*, 120 N.Y. 228, 24 N.E. 314 (1890). In the *Benedict* case, which involved the appropriation of real property for canal purposes, the Court stated (p. 232):

> "The neglect to present the claim within one year after the construction of the dam was a waiver of all rights of damages against the state."

The wording of the Canal Act (Section 48 of the Revised Statutes, Article 3, Title 9, Part I) which was interpreted in the *Benedict* case is very similar to the wording of the Water Supply Act §K41-18.0 which was interpreted by the New York Court of Appeals in the case at bar.

(3)

In *Pierce* v. *Somerset Railway*, 171 U. S. 641 (1898), this Court ruled that the defense of estoppel on account of laches and acquiescence is not a Federal question and stated (p. 648):

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost

such right by his failure to act, or by his action, is not a Federal one."

In *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254 (1891) the essential facts, as far as pertinent here, were that pursuant to an act of the Wisconsin Legislature in 1848, the State of Wisconsin, between 1853 and 1855, caused a dam to be constructed on the Fox River to divert water into a canal around rapids in the river. The statute did not make adequate provision for the ascertainment and payment of compensation for properties taken. Later, in 1875 Congress passed an act to aid in the improvement of the Fox and Wisconsin Rivers which provided for the ascertainment of damages to the owners of properties flooded or injured by the improvements theretofore or thereafter constructed. In 1876, pursuant to that act, the United States built a dam on the Fox River forty feet downstream from the old dam, which, like the old dam, caused the flooding of property of the defendant Kaukauna Water Power Company. In 1888 Congress passed another act which made appropriation for the payment of flowage damages to approximately 125 claimants but provided that the United States should not be held liable for damages "unless the action or proceeding to ascertain and determine the amount . . . shall have been or shall be commenced . . . prior to the passage of this Act; and all claims and causes of action now existing upon which no proceeding has been already or shall be taken within the time last specified to enforce the same shall be forever barred." In this suit by the Canal Company, which acquired its rights from the State of Wisconsin, for an injunction restraining the Power Company and its tenants from interfering with the pond created by the dam the Power Company contended, among other things, that the Canal Company had not acquired the right to flood the land of the Power Company because neither

the Power Company nor its predecessor in title had ever been paid for the land overflowed. In affirming a decree of the Supreme Court of Wisconsin granting an injunction this Court indicated that although the defendants, as the owner of and persons interested in land overflowed, had been entitled to compensation, they had not been deprived of their property without due process of law and, referring to the defendants, said (p. 280):

> "Congress was not obliged to keep the Act of 1875 in operation forever, and reasonable opportunity having been afforded to the plaintiffs in error to obtain compensation for the damages sustained by the construction of the improvement, we think they must be deemed to have waived their right to them."

An owner who has been afforded an opportunity of having compensation and damages assessed for property taken or injured and has failed to avail himself of that opportunity cannot enjoin the improvement on the ground that compensation has not been paid or tendered to him. See *Wabash R. Co.* v. *Defiance*, 167 U.S. 88 (1897). Although the appellant in her complaint sought to enjoin the appellee from diverting the waters of the Neversink River (R. 12) she has apparently abandoned that position and now seeks instead an opportunity to be heard as to the extent of damage and compensation (appellant's brief, pp. 6, 12, 41).

Not having presented her claim in the Neversink Riparian Section No. 4 proceeding within the time prescribed by statute the present appellant is now barred from asserting a claim in the proceeding, maintaining an action for damages or for possession of the property, or maintaining the present suit for an injunction.

CONCLUSION

The order and judgment appealed from should be affirmed, with costs.

September 20, 1962.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 75.

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S REPLY BRIEF.

LOUIS B. SCHEINMAN,
Attorney for Appellant,
Woodbourne, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 8-4131—1962

Index.

Page

Additional Statement of the Case 1

Point I. The belated claim made by appellee that appellant's address was unknown is not true 2

Point II. The question of the residence of the appellant is immaterial 4

Point III. Notice, consistent with due process, of the application to condemn was required in this case, apart from adequate notice to ensure compensation 9

Point IV. There are many inaccuracies in appellee's brief 11

Conclusion 20

CITATIONS.

Huling v. Kaw Valley Railway and Improvement Co., 130 U. S. 559 (1889) 4, 5, 6, 7

Matter of Huie (Richle), 6 A. D. 2d 838, 176 N. Y. S. 2d 197 (1958) 15

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652 (1950) 6, 7, 17, 18

Nelson v. City of New York, 352 U. S. 103 (1956) 13

Onondaga Water Service v. Crown Mills, 132 Misc. 848, 230 N. Y. S. 691 (1928) 10

Walker v. Hutchinson, 352 U. S. 112 (1956) 6, 17

Wuchter v. Pizzuti, 276 U. S. 173 (1928) 16, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 75

MADELINE C. SCHROEDER,

Appellant,

against

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S REPLY BRIEF.

Additional Statement of the Case.

The appellant is a resident of New York State, although she is also a resident of New Jersey. The complaint states that she and her family reside at the premises in question during the summer and in Dumont, New Jersey, the remainder of the year (R. 8). Her addresses both places were known to the appellee, as will be shown beyond question herein.

POINT I.

The belated claim made by appellee that appellant's address was unknown is not true.

The appellee gave no personal notice, by letter nor in any other manner, to *any* of the property owners along the Neversink River, as the statute did not require the same. Consequently, this claim that appellee was unaware of appellant's address cannot possibly be considered a reason for failing to give some form of personal notice. Instead, it is a much belated excuse which can be seen to be completely untrue for the following reasons:

Prior to the institution of the proceeding, appellee prepared taking maps, and filed a duplicate original in the Orange County Clerk's office on December 5, 1951 (R. 23), a reduced scale copy of same being an exhibit in this case (Def. Ex. A, R. 23).

The index sheet lists the names of the record owners of the parcels taken, and the Court will note that the said Exhibit A, which is the taking map for Neversink Riparian Section No. 4, lists Madeline Schroeder as the owner of Parcel 424.

Sheet No. 10 of this map shows the location of Parcel No. 424 (R. 23, Def. Ex. A) and this Court will note that the various parcels are delineated and the river frontages shown to 1/10th of a foot.

These maps were prepared only after deed studies were made by appellee from which deed studies appellee learned the names of the record title holders and the exact amount of river frontages. Appellant's deed recorded in the Orange County Clerk's office, April 19, 1950, in Liber 1154 of Deeds at page 506 (R. 11, par. 1), contains, alongside her name, her address at 30 Seneca Avenue, Dumont, New

Jersey. Consequently, when appellee learned her name, it learned her address in New Jersey. Since we must assume that appellee knew the location of the property it was taking, it consequently also knew her address at the premises in question in New York.

Referring to another public record, and since tax bills are mailed in the winter, the tax rolls of this property for the years 1951 and 1952 likewise contained the address of 30 Seneca Avenue, Dumont, New Jersey.

The majority opinion of the New York Court of Appeals paid no heed to this fallacious argument by appellee. In fact, the dissenting opinion said:

> "Here personal service is not required and no personal service was made although such a requirement could have been easily met since the City knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given."

Does the appellee suggest that if it had had an address it would have mailed a notice? No notices were mailed to *anyone*.

In no event is this a case of a missing or unknown owner who has disappeared.

We respectfully point out that it should not be necessary to argue about whether appellant's address was known or unknown. It is sufficient in this case that the *statute itself* makes no provision whatever for any form of personal notice, nor even any attempt at it. It is also obvious that there is no state court construction of this statute requiring any personal notice of any kind, nor of anything additional to what the statutory or language requires. The statute is, therefore, on its face, short of the minimum requirements of due process.

POINT II.

The question of the residence of the appellant is immaterial.

It is shown in this record (R. 8) by allegation in paragraph 11 of the complaint, that the appellant and her family occupied the riparian premises during the summer months of July and August, and resided the remainder of the year in Dumont, New Jersey.

It is therefore apparent, that, aside from the question of domicile, she is a resident of New York as well as New Jersey.

The case of *Huling v. Kaw Valley Railway and Improvement Co.*, 130 U. S. 559 (1889), is relied upon heavily by the appellee, which refers to the case on pages 11, 14 and 15 of its brief. We respectfully submit that this reliance is misplaced.

Appellee urges this Court that since *Huling* condoned notice by publication alone as against a non-resident owner, that this is, therefore, authority for this Court to now hold that notice by publication alone is adequate as against this appellant.

A more careful reading of the *Huling* case gives rise to a different and more accurate interpretation.

In *Huling* the Court held that notice by publication alone was adequate and complied with due process in the case of *residents and non-residents alike.*

The opinion stated at page 563:

> "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient

> if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters."

Thereafter the opinion went on to hold that non residence of the property owner in that case was no excuse for his failure to receive notice in the eyes of the law. It held that because the property owner is out of the jurisdiction of the Court of the state, "he cannot hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property; * * *"

In other words, *Huling* held, as a reading of the opinion will show, that a non-resident was not entitled to any more consideration than a resident. It did not hold that a non-resident was entitled to less consideration than a resident, for in *Huling* the Court said that notice by publication alone was adequate in all cases.

We submit that the contention urged by appellant that personal service is required under the recent decisions of this Court for residents, but is not required for a non resident, would be eminently unfair, and would, we believe, violate the equal protection clause of the Constitution as it would obviously discriminate against a property owner who was a non-resident.

There is no reason to justify such a rule.

Where the address of the property owner is known or where it could be ascertained by merely looking at a deed or a tax roll, what difference does it make if it is an out-of-state or an in-state address? The same postage stamp would carry the notice through the mails to any address. The statute in question on this appeal contains

no requirement, and the state courts construe there to be no requirment, for mailing or any form of personal notice to anyone, resident or non-resident, and the statute provides no requirement for any effort, no matter how slight, to be made to find the address of anyone, resident or non-resident.

It is, therefore, on its face, repugnant to the Constitution.

Appellee indicates that *Walker v. Hutchinson*, 352 U. S. 112 (1956), distinguished *Huling* on the grounds of residence (appellee's brief, pp. 14, 15), the intimation being that *Huling* was still good law today.

The quote evidently referred to in *Walker* is as follows:

> "Decided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the landowner was a non-resident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision."

That *Mullane* undermined *Huling* is beyond question, as *Huling* held that notice by publication alone was adequate as against everyone and *Mullane* held it no longer adequate in modern times. In the above quote from *Walker*, Mr. Justice Black said that the Court was not called upon to consider the *extent* to which *Mullane* undermined *Huling*. However, it is clear that undermine it, it did.

It is also interesting to note that in *Huling* commissioners made an appraisal of the property and awarded to the landowner $725. Considerably more than 1/2 of the property owners in this Neversink proceeding have received nothing and will receive nothing, for the properties taken from them if the appellee's conduct and contentions are upheld by this Court.

We might also point out that it is abundantly clear from the reading of Mr. Justice Jackson's opinion in *Mullane* that no distinction was made between residents and non-residents.

On page 309 of *Mullane* it is stated:

> "The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some were not residents of the State of New York."

Kenneth Mullane had been appointed special guardian and attorney at the time of the judicial settlement for "all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund."

We will concede that prior to *Mullane*, notice by publication alone was adequate. However, it was *Mullane* that changed this rule. Mr. Justice Jackson said at page 319:

> "However, it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication."

Appellant respectfully submits that although she is a resident of New York as well as New Jersey, the question of residence is of no import in this case.

It is of interest to note the manner in which the appellee states the "Question Presented" in its brief to this Court (appellee's brief, p. 3).

It states the question here to be whether the notice is adequate as to a non-resident whose address was not known.

Appellee never so limited its interpretation of the issue before the New York courts.

In its briefs to Special Term, the Appellate Division and to the Court of Appeals, it stated the "Question Presented" as follows:

> "The principal issue here is whether the Water Supply Act is constitutional, especially with respect to the provisions regarding notice to the owners of property taken or affected."

The City, as it can be seen, now, on this appeal, limits the question to whether the notice is adequate with respect to a non-resident and unknown owner.

The Court below held the statute constitutional generally and paid no heed to the appellee's argument of non-residence and ignorance of appellant's address.

Should this Court now hold this statute constitutional, or that due process was accorded this appellant on the grounds of non-residence or that her address was unknown, it would truly complicate the status of this statute.

By far, the majority of the hundreds of late filed claims are by property owners who are residents of New York State. Some, to the knowledge of this writer, even reside at their riparian property the year round. What would happen in a new action by one of such owners? Appellee would then not be able to claim his non-residence, nor that his address was unknown. Would he obtain relief, but his neighbor who winters in New Jersey and whose R. F. D. mailbox stands alongside his, obtain none?

POINT III.

Notice, consistent with due process, of the application to condemn was required in this case, apart from adequate notice to ensure compensation.

Appellee makes the point on pages 21 and 22 of its brief that due process requires adequate notice only on the question of compensation. Its point is that a municipality can condemn property and acquire title without notice to the owner, and that this does not violate due process so long as the owner is (subsequently) given fair notice of his right to be heard as to its value.

Appellee makes this point to refute our argument that in this case, appellant was deprived of her right to be heard as to the extent or reasonableness of the taking.

This is important in that the Court below relied upon an assumed visible effect of the diversion as providing extra-statutory notice here, which diversion did not even take place until more than a year *after* the application was made (see appellant's main brief).

Consequently, if appellant were entitled to notice consistent with due process of the application to condemn, this crutch of extra-statutory notice, as it did not occur until more than a year later, could not be used, and the Court of Appeals would have been clearly in error.

We concede that, as a general rule, a taking of private property by eminent domain can occur without any notice to the property owner, without violating due process, provided that adequate notice is thereafter given to ensure the owner just compensation. However, that rule has no application in this case.

Where the legislature of a state gives to owners of property a certain right in a condemnation statute,

this right becomes an incident of his property, and he cannot be deprived of that right by the condemning municipality, nor by anyone else, without due process.

The Water Supply Act is a statute enacted by the Legislature of the State of New York. This statute provides for notice to be given of the application to condemn (the statute in question here). The application is not *ex parte* under this statute.

This statute, therefore, created in appellant the right to be heard on the return date of the application. Appellant's main brief mentioned how this exact right was used in Section #1 to extract a decretal provision in the order of condemnation requiring releases from the dam.

Appellant could not be deprived of this right, except by due process of law, which requires notice.

An example of the right of a New York property owner, under New York law, to object to the necessity of the extent of the taking, completely apart from the question of compensation, is the case of *Onandaga Water Service v. Crown Mills*, 132 Misc. 848, 230 N. Y. S. 691, also involving riparian rights.

Said case is illustrative of the legal principle that a riparian owner, which the case involved, could object to the extent of the taking aside from any question of compensation.

Said case reiterates the generally accepted principle that only such property as is necessary for the public use can be taken by the power of eminent domain.

Consequently, Madeline Schroeder had the right, under the Water Supply Act, to appear on the return date and object to anything she thought improper in the proceeding, the public necessity, the extent of the rights that appellee sought to acquire (which was actually done by property

owners in Section #1 as explained earlier) or even to the persons being appointed as commissioners.

For more than a year after the return date of the application in this case, there was no diversion. This supposed source of extra-statutory notice was not even in existence at that time.

POINT IV.

There are many inaccuracies in appellee's belief.

There are a number of statements made in appellee's brief which are less than candid.

On page 5, appellee denies that the division of the river into sections by it was arbitrary and points to Section K41-5.0 containing a general direction that a section shall be no larger than that in which one commission can hear all cases in one year. Appellee then says that there were an average of 84 parcels in each section which a commission could reasonably be expected to dispose of in one year.

Section No. 4 has 96 numbered parcels, and, as stated in our main brief (p. 38), at least another 100 properties not shown on the maps but having deed rights to the river. The appellee's brief on page 8 admits the appointment of successor commissions. There were no less than four commission, an original and three successors, in Section No. 4.

The term of one commission is 12 months and each commission on the Neversink has been renewed for an additional eight months, making a total of 20 months. Considering the hiatus between commissions, a figure of two years per commission is fair, and, in this case, four commission were sitting for a period of eight years. Although the taking was in 1952, cases were being tried in 1959.

The statement in appellee's brief on page 5 that one commission can reasonably hear 84 cases is ridiculous. No commission, no matter how active, could reasonably be expected to hear more than 30 cases per year. Had the City intended to comply with the aforesaid direction, Section No. 4 should have actually been nine sections with nine commissions.

Twenty handbills for 30 properties would be a better ratio than 22 handbills for approximately 200 properties involved, which latter was the actual case here. The proof of the inadequacy of the notice here is in the reality of the admitted figures that only 18 of the 96 numbered parcels filed in time and were paid, and the City has acquired the remaining 78 parcels, in addition to a great number of other parcels involving upland properties with deed rights to the river, without paying any compensation at all.

The statement "that appellant did not allege that she was unaware of the diversion" appearing on page 9 of the appellee's brief, is nothing more than a play on words.

The complaint, in which all of the allegations must be deemed true on this motion, leaves no doubt as to appellant's lack of knowledge. This should certainly not be surprising in view of the fact that 81% of the riparian owners of numbered parcels in Section 4 failed to file in time (R. 10).

The complaint alleges (R. 9) that appellant never read or saw any copies of the New York City advertisements nor that she customarily purchased any New York City newspapers nor of Orange County, and that she never observed any handbills anywhere, and that at no time prior to her retention of counsel, "did plaintiff learn

or know that the City of New York had acquired possession of her property and that she had a right to claim against the City of New York." The complaint further states on the same page that she has never been at any time notified in any manner that appellee sought to acquire its rights in the Neversink nor has she ever been served with summons nor given any other personal notice of any kind whatsoever. The complaint further states (R. 10) that notice was by publication only and that appellant "had no knowledge, either constructive, actual or implied" of such proceeding prior to her retention of counsel.

We have stated in the main brief why it is that a layman could not determine from observing the river itself that its condition was caused by an artificial diversion at a dam 25 miles upstream, and in a different county. Appellant never did, and certainly does not in this case, admit any knowledge whatever that she knew that there had been a diversion.

The *Nelson* case relied upon by the City on page 11 of its brief is not in point in that the statute there required mailing. A reading of the case further shows substantial notice actually had by the appellant in conformity with the statutory requirements of mailing tax bills, etc.

Appellant does not "intimate" that appellee knew appellant's address, as stated in appellee's brief on page 12.

Appellant affirmatively states this to be an indisputable fact as shown earlier in this brief.

Appellee seeks to distinguish publication and posting in this case. However, the use of handbills cannot be considered "posting" in the same sense as the word is otherwise used.

It is true that in certain cases posting is authorized and stands in the place of personal service. However, this is only so in those cases where the posting is done in such a manner as to constitute, and its purpose is to constitute, substituted *personal* service. For example, Section 230 of the New York Civil Practice Act provides that substituted service on certain defendants may be made pursuant to a Court order *upon satisfactory proof that the plaintiff will be unable to make personal service*. Section 231 provides that the court order must direct that the summons be served by service upon substituted persons connected with the defendant or, if the same cannot be accomplished, by affixing the summons to the door of defendant's place of business, office or residence and, in addition thereto, the mailing of same to the defendant at his office or place of business or place of residence. It is only where proof is shown that even the foregoing service cannot be made, that a Court may direct some other form of substituted service.

So, too, in other cases the papers are affixed or posted on the *res* itself or actual physical possession of the *res* is taken.

In the instant case, had the statute provided for a notice to be posted on the dwelling of *each* property affected, or in a conspicuous place on *each* property, the statute would stand on a better constitutional footing, although we believe it would have still been inadequate without requiring some attempt at personal service.

However, the affixing of handbills in remote places cannot be in any sense considered any form of *personal*

notice particularly since it is not connected with any particular parcel of property, fails to mention the name of any person affected, fails to mention anything about the need to file a claim, where, when or how. This broadcast type of notice must be ineffective, when done in midwinter in the forested lanes along the river, in a summer occupied area.

It is interesting to note, for example, that on page 19 of appellee's brief, referring to the *Richle* case, an attorney did not even know where and how to file a claim. Parenthetically, this *Richle* case is also a representative case involving a large number of late filed claims.

There is truly no reason to therefore distinguish the handbills from the newspaper advertisements. Both are merely different forms of publication. There is nothing "personal" with respect to either.

Appellee does not even claim the handbills to constitute any form of personal notice. Whichever view is taken, the service here was purely and entirely constructive, and there is no reason for it to have been constructive in a condemnation proceeding where known real estate was being acquired.

The fact that a handbill was attached to a tree in January at the end of a road more than 1200 feet from appellant's property as alleged on page 15 of appellee's brief, should not entitle the appellee to have this Court believe that this handbill remained long enough on this pole and survived the elements and was read by appellant. Further, there is no requirement in this statute that this handbill be affixed in this manner at this place, nor of the material used; and to assume that this provided any actual notice is gross speculation.

We agree that a Court can take judicial notice of a geographical fact, as stated on page 16 of appellee's brief. However, that of which the Court takes judicial notice must be, in the first instance, an accepted fact.

Assuming, *arguendo* only, that the visibility or apparency of the diversion and its cause was a "geographical" matter, its status as a "fact" in this case is certainly dubious.

A court Can take judicial notice that Philadelphia is in Pennsylvania, but should not on the grounds of a "geographical fact", take judicial notice that it is in Ohio. There is absolutely no reason in this record for the Court below to have assumed that the diversion gave actual notice, since it was not alleged by appellee in its pleadings and strongly denied in the briefs of appellant when alleged in the City's briefs.

Neither the size of the reservoir, 25 miles distant from the subject property; nor the United States Supreme Court decrees, nor any isolated newspaper mention of same in any respects, should be considered adequate to have advised this appellant of the taking of her property and that it was incumbent upon her to file a claim between the specific dates of June 9th, 1952 and June 9th, 1955.

The case of *Wuchter v. Pizzutti*, 276 U. S. 173 (1928), was not in any sense inconsistent with *Mullane*, as urged on page 20 of appellee's brief.

Nor did Justices Brandeis, Holmes and Stone dissent upon the grounds urged by appellee.

The dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, was upon the grounds that there was no statutory construction by the New Jersey

Court before the Supreme Court. The dissent stated that the New Jersey Court might have construed the statute in question as requiring mailing and that it was even probable that the New Jersey Court would have so construed the statute, in which case, since there was actual mailing, the statute would be constitutional.

The dissent further pointed out that it might have been the general practice to mail process, and that such administrative construction would carry much weight with the New Jersey Court. This dissenting opinion expressed the view that the case should be remanded to the State Court for the purpose of determining whether the statute actually required mailing by the State Court's interpretation.

Mr. Justice Stone's dissent was also upon these grounds.

It is also, however, correct to say that the concluding paragraph of the dissenting opinion also mentioned the fact that the defendant had actual notice and an opportunity to defend, citing a number of cases in which appear situations where complaining parties had appeared in the proceedings.

Appellant pointed out in its main brief on page 33 that there are two exceptions to the *Wuchter* rule, one being where there has been an appearance in the proceedings, and the other being where the state Courts have construed the statute to require actual notice, neither of which is the case here.

Mullane held nothing the least bit inconsistent with *Wuchter*. *Mullane* was decided on the grounds of the absence of the requirement of mailing in the statute, and did not turn upon or deal with whether or not mailing or any other form of actual notice was actually given.

In *Mullane*, at page 319, the Court said that "The *statutory* notice to known beneficiaries is inadequate, not because *in fact* it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand" (emphasis added). On page 320, in concluding, the Court said: "We hold that the notice of judicial settlement of accounts *required* by the New York Banking Law, §100-c (12) is incompatible with the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights" (emphasis added).

The Court in *Mullane* held that the statute, *on its face*, as to known beneficiaries, was repugnant to the Constitution.

The questions of estoppel, laches, waiver, or acquiescence, are not issues before this Court. These defenses raised by appellee in its answer to the complaint were matters to be decided by the state Court under applicable state law.

The New York Courts have ruled these defenses in this case to be without merit in that all New York Courts dealing with this case have gone directly to the constitutional question. Had any of these defenses been meritorious, it would not have been necessary for the Courts below to have gone beyond sustaining any of same. In fact, the dissenting Judges of the Court of Appeals said:

> "The judgment appealed from should be reversed, with costs in all courts, and plaintiff's cross-motion for judgment on the pleadings granted" (R. 52).

Appellant has not abandoned her request for an injunction as stated by appellee on page 24 of its brief.

Appellant has been frank and candid in its brief in pointing out that if this case is reversed the City will not be required to abandon its water supply project, but would merely have to give further notice and permit property owners to present their claims for damages, and to pay such damages as would be judicially determined. She merely states, in effect, that she would be satisfied with such relief.

However, this action is nevertheless one for an injunction placing the question of title in issue. Such question of whether or not the City of New York has acquired title, in turn, depends upon the determination by this Court of whether the notice provided by the statute was adequate and fair enough to comply with due process.

All here agree that an established legal principle applicable is that the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The law is not a true science. We know that the decision of a Court cannot be mathematically computed in advance.

However, on occasion we see a case where certain mathematical information can be set alongside an accepted legal principle, and whether or not they are in harmony can be measured. This is such a case.

Let us take the above legal principle and lay alongside of same the fact that more than one-half of the owners of numbered parcels failed to file in time, even discounting the upland property.

Let us consider the figures in Section #4 where 81% of the owners of numbered parcels (discounting upland property) did not file in time.

Can it be that these figures are in harmony with the aforesaid accepted doctrine of law?

CONCLUSION.

It is respectfully submitted that this statute is inconsistent with even the barest and minimum requirements of due process guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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